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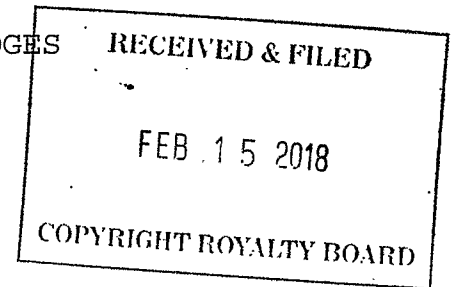
IN THE MATTER OF:)

) Docket No.

DETERMINATION OF CABLE) 14-CRB-0010-CD

ROYALTY FUNDS) (2010-2013)

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Pages: 1 through 226

Place: Washington, D.C.

Date: February 14, 2018

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10 BEFORE: THE HONORABLE SUZANNE BARNETT

11 THE HONORABLE JESSE M. FEDER

12 THE HONORABLE DAVID R. STRICKLER

13

14 Library of Congress

15 Madison Building

16 101 Independence Avenue, S.E.

17 Washington, D.C.

18 February 14, 2018

19

20 9:40 a.m.

21 VOLUME I

22

23

24 Reported by: Karen Brynteson, RMR, CRR, FAPR

25

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1 P R O C E E D I N G S

2 (9:40 a.m.)

3 JUDGE BARNETT: Good morning. Please
4 be seated.5 Last minute scrambling. Is that --
6 yes. Okay, good.7 Apparently, they changed our system
8 here. We don't have to hold it for on or off.
9 It's a true on/off switch. Amazing, isn't it?
10 Modern technology.11 Welcome to all of you. Today marks
12 the commencement, as you know, of the Copyright
13 Royalty Judges' hearing to determine ultimately
14 the distribution of royalty fees deposited with
15 the Copyright Office in years 2010 through 2013
16 in accordance with Section 111 of the Copyright
17 Act.18 This matter is Docket No.
19 14-CRB-0010-CD. Our purpose in this hearing is
20 to take evidence and hear argument relating to
21 allocation of the Section 111 cable deposited
22 funds among self-designated categories of
23 claimants.24 The Judges have not established a
25 proceeding schedule for allocation of the

1 Section 119 satellite royalty deposits because
2 of the representations of the parties, many or
3 most of whom are here already, that satellite
4 claimant categories would resolve their
5 allocation issues without a hearing upon
6 completion of the cable allocation process.

7 (Laughter.)

8 JUDGE BARNETT: I am, for those of you
9 -- I don't think there is anyone new in the
10 room, but I am Judge Suzanne Barnett. Seated
11 on my right is Judge Jesse Feder. On my left
12 is Judge David Strickler.

13 Our attorney advisor, Ms. Kim Whittle,
14 has been drafted for the duration to serve as
15 the hearing room clerk. Indeed, much of her
16 time, her valuable attorney time, has been
17 spent in the last year and a half to two years
18 doing this sort of clerk duty. And I won't
19 whine today about our lack of resources because
20 you know about it.

21 Ms. Whittle's duties, while she is in
22 the hearing room, include managing all
23 exhibits. We -- I haven't checked the stock
24 market, but I suspect Georgia Pacific's pulp
25 and paper stock has taken a dive since we went

1 electronic, but we still will have -- she will
2 have duties relating to the electronic
3 exhibits, and we'll manage any paper that
4 manages to find its way into the hearing.

5 At the end of the hearing, she will
6 work with all of your staff to verify that her
7 records are accurate prior to removing from
8 eCRB -- that's our electronic system -- any
9 proposed exhibits that you did not offer into
10 evidence, if there are any.

11 Prior to the hearing, the
12 participants, all of you, thank you, agreed to
13 admission of certain written testimony and
14 associated exhibits. We received those in
15 electronic form and will require only paper
16 copy for the purposes of our hearing.

17 With respect to hearing exhibits, we
18 do not need more than one paper copy of those,
19 provided you are using the electronic filing
20 system and also providing that your witnesses
21 or the witnesses you cross-examine have full
22 access to anything that you're wanting the
23 Judges to see and them to see and that you have
24 shared that with opposing counsel.

25 If you have prepared any paper copies

1 of exhibits for purposes of the hearing, we
2 will accept those, but the official exhibits
3 are those that are electronically filed. And
4 so any copies you have on paper will be just
5 working copies, and you can't rely on those
6 paper copies actually making it into the
7 record. Just so you know. It is your record.
8 You want to be sure it's complete. Be sure you
9 file electronically everything that can be.

10 If there is a paper that cannot be
11 transformed into an electronic document for
12 whatever reason, be sure that you make that
13 clear to us and clear on the record so that we
14 can mark it and keep it as part of the record.

15 Seated at the back of the room, if you
16 have not met or he has not introduced himself
17 or you have not, is our senior counsel,
18 Mr. Richard Strasser. He might or might not
19 attend all days of the hearing. It's at his
20 discretion.

21 You have, I'm sure, met our court
22 reporter, our intrepid court reporter,
23 Ms. Karen Brynteson. She is familiar with our
24 proceedings and the terminology and most of the
25 cast of characters, so she was incredible

1 before, but now with all of this groundwork
2 behind her, she will be just stupendous.

3 Nonetheless, please respect her skill
4 and patience by speaking one at a time clearly
5 and at conversational speed; especially if
6 you're reading something. It's very difficult
7 to read at conversational speed. And
8 Ms. Brynteson can pretty much keep up, but
9 let's give her a break during this hearing.

10 As you are aware, we will have a
11 recess each morning and each afternoon, and I
12 direct Ms. Brynteson to signal at any time she
13 needs to stop for any reason, to take a break
14 or to handle technological difficulties. It
15 used to be to change the paper, but we don't do
16 that anymore, I think.

17 We have six participants in this
18 portion of the proceeding who have agreed to
19 presentation of opening statements in this
20 order: Sports Claimants, Commercial Television
21 Claimants, Public Television Claimants,
22 Canadian Claimants, Devotional Claimants, and
23 Program Suppliers.

24 I will unnecessarily remind you all
25 that opening statements are meant as a guide to

1 assist the Judges. The statements and comments
2 of counsel are not evidence, and we do not
3 consider them as such.

4 The Judges will, during the course of
5 the hearing, focus on the evidence that you do
6 present and will not impose any demerits on
7 counsel or parties for evidence that might be
8 inconsistent with any particular of any opening
9 statement.

10 We are aware that you have filed --
11 I'm aware at least -- in the front of my brain
12 of at least one motion that remains under
13 advisement. There might be some more recent
14 ones. We will endeavor to rule on those
15 motions as soon as practicable. If you require
16 resolution of a particular motion before
17 calling a scheduled witness, please let us
18 know, so we can determine how to proceed.

19 Counsel will examine their witnesses
20 in the order upon which they agreed. Also by
21 agreement, each witness, as each witness is
22 called, he or she will testify regarding both
23 written direct and written rebuttal testimony,
24 and in response to the written rebuttal
25 testimony of any other participant. All

1 parties may, of course, cross-examine each
2 witness.

3 And let me offer thanks, again, for
4 the professionalism and courtesy that you have
5 extended to one another in making this
6 arrangement to make the hearing more
7 streamlined and concise.

8 At the end of the presentation of all
9 the evidence, the Judges and parties will
10 consult regarding the filing of proposed
11 findings of fact and conclusions of law. After
12 you have filed those written proposals, you
13 will have an opportunity to make closing
14 arguments in which you state the applicable law
15 and the way you wish the Judges to apply that
16 law to the evidence.

17 If you are in this hearing room today,
18 you are undoubtedly aware that the issues the
19 Judges must consider require review of
20 sophisticated economic analyses, confidential
21 business strategies, and sensitive financial
22 information. In this case, perhaps a little
23 bit less than in some of the others but,
24 nonetheless, it's -- we have a protective order
25 and there are restricted materials for a

1 reason.

2 We did issue that protective order
3 requiring every participant to follow a
4 protocol to maintain and protect the
5 confidential nature of information the parties
6 rely upon to advocate for a desired result.

7 The fact that this is an open hearing
8 does not override the parties' need to protect
9 their confidential business information. And
10 throughout all the early phases of this
11 proceeding, all parties have diligently marked
12 and edited confidential documents and have
13 filed copies of documents redacted for public
14 viewing.

15 Whenever a party needs to question a
16 witness regarding restricted documents, the
17 Judges will direct that any person in the
18 hearing room who has not signed an appropriate
19 nondisclosure agreement to leave the room and
20 to wait outside until we reopen the hearing.

21 I have not been alerted, but I haven't
22 really asked, whether we will need to close the
23 room during the course of any opening
24 statement, but you will, I'm sure, let me know
25 if that's the case.

1 It's my understanding that we will not
2 have realtime during the course of this
3 hearing. Normally, I make a plea if you are
4 having realtime streamed to your offices that
5 you make sure there's no one on the end of that
6 stream that is observing or recording
7 restricted material who is not otherwise
8 entitled to do so.

9 So if we make a change and decide to
10 go forward with realtime streaming, bear in
11 mind that if it is being transmitted to your
12 office, that you have to maintain the
13 confidentiality and the -- the restricted
14 nature of any testimony that is streamed over
15 realtime.

16 We appreciate your cooperation in this
17 matter.

18 Now, at this time, I ask each lead
19 counsel to stand, please, identify yourself for
20 the record, introduce your client
21 representatives, if you have any here present,
22 and any co-counsel and staff who are here with
23 you. Beginning -- let's go in order of
24 presentation, Joint Sports Claimants.

25 MR. GARRETT: Good morning, Your

1 Honor. Bob Garrett from Arnold & Porter on
2 behalf of the Joint Sports Claimants. With me
3 at counsel table are my colleagues from Arnold
4 & Porter: Sean Laane, Daniel Cantor,
5 Michael Kientzle, Bryan Adkins, all of whom
6 have, I want to note, shaved off their beards
7 for purposes of this hearing here.

8 JUDGE BARNETT: That was unnecessary.
9 (Laughter.)

10 MR. GARRETT: I was the only one who
11 didn't have a beard, Your Honor. And also from
12 Squire Patton and Boggs, Mr. McPhie, Iain
13 McPhie, on behalf of the NCAA.

14 We also have with us in the room today
15 Mr. Michael Mellis, who is the general counsel
16 of Major League Baseball; Ms. Schwartz, to his
17 left, from Baseball; and to his right Vicky
18 Loughery from the National Football League.

19 JUDGE BARNETT: Thank you.

20 And, Mr. Garrett, will you be the
21 representative making the opening statement?

22 MR. GARRETT: I will, Your Honor.

23 JUDGE BARNETT: Thank you.

24 For Commercial Television?

25 MR. STEWART: Good morning, Your

1 Honor. I'm John Stewart of the firm of Crowell
2 & Moring. I'm here today with my colleagues
3 David Ervin and Ann Mace, and back there at the
4 technology table is Bob Anderson. Ann was the
5 only one who couldn't grow a beard for this
6 proceeding, but we all tried hard.

7 (Laughter.)

8 JUDGE BARNETT: Thank you. That's the
9 way I tell one party from the others.

10 (Laughter.)

11 JUDGE BARNETT: It's the beards versus
12 the non-beards.

13 MR. STEWART: And I will be presenting
14 the opening argument.

15 JUDGE BARNETT: Thank you,
16 Mr. Stewart.

17 For Public Television?

18 MR. DOVE: Good morning, Your Honors.
19 My name is Ron Dove, and I'm with the law firm
20 of Covington & Burling. And with me are
21 Dustin Cho and Rob Hunziker. I also have
22 Sandy Pope, who is director of copyright at
23 Public Television, and Scott Griffin, who is
24 assistant general counsel at Public Television.

25 JUDGE BARNETT: Thank you. And,

1 Mr. Dove, will you be making the opening
2 statement?

3 MR. DOVE: I will.

4 JUDGE BARNETT: Thank you.

5 For the Canadian Claimants Group?

6 MR. SATTERFIELD: Good morning, Your
7 Honor. My name is Kendall Satterfield for the
8 Canadian Claimants Group. I have with me today
9 Victor Cosentino of Larson & Gaston,
10 representing the group. We have no other
11 assistants or anyone from our -- or any
12 principal here today. Mr. Cosentino is going
13 to do the opening statement.

14 JUDGE BARNETT: Thank you.

15 Devotionals?

16 MR. LUTZKER: Good morning, Your
17 Honor. My name is Arnold Lutzker of the firm
18 Lutzker & Lutzker. And with me is my colleague
19 from the firm of Pillsbury Winthrop, Matthew
20 MacLean, who actually grew a beard for the
21 purposes of these proceedings.

22 JUDGE BARNETT: He did as a disguise,
23 yeah.

24 (Laughter.)

25 MR. LUTZKER: Also from the Pillsbury

1 firm are Jessica Nyman and Michael Warley, and
2 from Lutzker & Lutzker Ben Sternberg. And I'll
3 be making the opening argument.

4 JUDGE BARNETT: Thank you,
5 Mr. Lutzker.

6 Program Suppliers, Mr. Olaniran?

7 MR. OLANIRAN: Good morning, Your
8 Honor.

9 JUDGE BARNETT: Welcome back.

10 MR. OLANIRAN: Thank you. Good
11 morning, Your Honors. Greg Olaniran with the
12 firm of Mitchell, Silberberg & Knupp. And with
13 me are my colleagues Lucy Plovnick, Alesha
14 Dominique, Dima Budron, and -- I'm trying the
15 get the last name correct -- Albina
16 Gasanbekova. I think I got it right. And
17 together we represent Program Suppliers, and I
18 will be delivering the opening statement.

19 JUDGE BARNETT: Thank you,
20 Mr. Olaniran.

21 Just one matter of housekeeping.

22 This building, the Madison Building,
23 will be having its periodic power shutdown over
24 this coming weekend. There's some kind of
25 testing and who knows what all and why they do

1 it, but the power will be out in this building
2 over the weekend.

3 All equipment, therefore, should be
4 turned off before you leave at the end of the
5 day or when you leave at the end of the day
6 tomorrow, just to protect it for all purposes,
7 just be sure we're shut down in this room.

8 We have been promised a power-up by
9 Tuesday morning, recalling that Monday is a
10 holiday. We've been promised a power-up by
11 Tuesday morning. We keep our fingers crossed.
12 Not to be a negative planner, but the last time
13 we had one of these, the Copyright Office
14 remained off-line for several days after the
15 attempted power-back-up.

16 So we'll keep you posted. We assume
17 everything is going to go as it should. They
18 don't want to have that happen again. So it
19 may be one of the reasons they do these
20 periodic power-offs, just to make sure they
21 figure out to make it happen.

22 JUDGE FEDER: Just ECRB is hosted in
23 the cloud. So that system should not be
24 affected by the power outage. However, the
25 domain server that directs you to ECRB is a

1 library system, so I don't know what will
2 happen with that.

3 JUDGE BARNETT: We hope that anything
4 you file will just kind of go into a queue so
5 that if it has to go through here and get
6 stopped here, it will at least get to us
7 ultimately, but I am the antithesis of tech
8 savvy, so don't depend on what I tell you about
9 that.

10 So thank you. Mr. Garrett, you may
11 begin with your public opening statement on
12 behalf of the Joint Sports Claimants. Are you
13 anticipating closing the courtroom during your
14 statement?

15 MR. GARRETT: No, Your Honor, none of
16 my slides are restricted here.

17 JUDGE BARNETT. Thank you. Excuse me.
18 Mr. McLean?

19 MR. MacLEAN: Thank you, Your Honor,
20 Matthew MacLean for settling Devotional
21 Claimants. And I'm sorry to interrupt the
22 flow. Before we get started, though, there is
23 another matter I'd like to bring up.

24 And you did just ask if pending
25 motions needed to be resolved before a

1 particular witness. You haven't solicited
2 argument so I won't offer any, but we do have a
3 pending motion to strike two -- it goes
4 directly to two exhibits, Exhibits 6018 and
5 6019, which are the written testimony of
6 Dr. Gray, a witness for MPAA. Dr. Gray is up
7 25th, very last on the -- on the witness list.

8 However, this motion is going to have
9 ripple effects on other witnesses. Because we
10 have agreed that direct and rebuttal testimony
11 is going to be presented at the same time from
12 each witness, we've got multiple, multiple
13 witnesses and exhibits on the list now that
14 could potentially be affected, you know,
15 possibly requiring substitution or something
16 like that.

17 I do dearly hope that if we get to the
18 point of substitutions, that you will again
19 adopt the prime, double prime, triple prime
20 system, so that my 20 colleagues in the room
21 will have the joy of dealing with that.

22 But I will --

23 JUDGE BARNETT: You had to bring that
24 out of the closet, didn't you, Mr. MacLean?

25 (Laughter.)

1 MR. MacLEAN: I simply wanted to bring
2 to the Judges' attention that we would request
3 a ruling on that motion before the testimony of
4 Mr. Garrison Harvey, who is fifth on the
5 witness list, during the -- during the
6 presentation of the Joint Sports Claimants.

7 Otherwise, we're going to be in a very
8 serious problem with substitutions and phantom
9 exhibits and so forth that may not be -- I
10 mean, it's -- I'm trying to stave off the
11 gathering storm here and so I would request a
12 ruling by that point in the presentation.

13 JUDGE BARNETT: Thank you. I
14 appreciate that.

15 Let me just be sure I am
16 understanding. This is, this has to do with
17 the third errata?

18 MR. MacLEAN: Correct.

19 JUDGE BARNETT: The third iteration of
20 Dr. Gray's testimony?

21 MR. MacLEAN: That is correct.

22 JUDGE BARNETT: Okay. We're into
23 that. It's under advisement. It's not like we
24 shoved it off into the future, but we have not
25 made our decision on that. But I appreciate

1 you giving us a timeline or a sense of urgency
2 on that.

3 MR. MacLEAN: Thank you, Your Honor.
4 Your Honor, there is a second closely related
5 issue.

6 After our expert was able to get into
7 the second errata and underlying documents and
8 so forth, we did serve on MPAA a set of
9 supplement -- supplemental document production
10 requests. We received a response to that last
11 night.

12 I really would prefer to avoid making
13 this a -- escalating this into a major issue.
14 I -- I -- their -- they objected as you might
15 imagine to our requests. But at the end, they
16 did answer each of the -- each of our requests
17 saying, notwithstanding these objections and
18 the specious nature of the SDC's request, which
19 clearly violates the Judges' rules,
20 regulations, and precedent, Program Suppliers
21 state they are unaware of any responsive
22 documents underlying Dr. Gray's testimony that
23 have not already been produced in this
24 proceeding.

25 They provided substantially the same

1 answer to each of our document production
2 requests. Again, I'm really trying to avoid
3 the necessity of escalating this into a larger
4 issue.

5 However, our, what we basically want
6 and believe we are entitled to know, as you may
7 have read the triggering factor, I suppose you
8 might say, in the -- in the changes in
9 Dr. Gray's testimony came based on MPAA's
10 assertion that he discovered that he had not
11 been provided distant viewing data for WGNA.

12 Our document requests basically go to
13 the question of what did he discover, when did
14 he discover it, what did he do about it?
15 Because none of this is explained in his
16 testimony.

17 This is critical in part because,
18 according to the underlying data, he did, in
19 fact, have some distant viewing data for WGNA.
20 We can't tell what the difference is. I mean,
21 we can see the difference in the data, but we
22 don't understand the reason for the difference
23 in the data.

24 It's also critical, we believe, in our
25 view and in our case, we believe it's important

1 when Dr. Gray and MPAA discovered this -- this
2 missing data. Considering that it was filed
3 only about two weeks before the scheduled
4 beginning of the hearing, we would like to know
5 and we think it's critical to know.

6 And we also would like to understand
7 Dr. Gray's changes to his -- and the reasons
8 and the alternative courses of actions
9 considered with respect to Dr. Gray's changes
10 to his regression methodology. We also have
11 earlier follow-up discovery requests that would
12 have addressed this.

13 What the point I want to make is when
14 Dr. Gray takes the stand, I will ask him, if
15 nobody else asks him first, when did you
16 discover this? What is it that you discovered?
17 What did you do about it?

18 What I want to avoid is, gee, I don't
19 remember, I'd have to go back and check my
20 e-mails. Let's get the e-mails now. That's
21 all I'm asking. I read MPAA's response as
22 saying: We don't have any. I will ask
23 Dr. Gray if there are e-mails and underlying
24 documents.

25 I would -- I would simply at this

1 point ask the Judges to urge MPAA to look again
2 because if it turns out they do have underlying
3 documents and it comes out on testimony, I'm
4 going to have to ask for appropriate relief at
5 that time. And like I say, I'm trying to avoid
6 that gathering storm and trying to avoid an
7 unnecessary escalation. That's all.

8 JUDGE BARNETT: Thank you,
9 Mr. MacLean.

10 Ms. Plovnick?

11 MS. PLOVNICK: Your Honor, so SDC's
12 discovery request was directed at statements in
13 a pleading that we filed in the cover pleading
14 to our errata. And the Judges have already
15 addressed this in the course of numerous
16 different proceedings.

17 And the regulations state clearly that
18 discovery requests were supposed to be directed
19 at written exhibits and testimony, not at
20 pleadings filed by counsel.

21 Had they been directed at actual
22 written testimony or exhibits, then we would
23 have felt that they were not contrary to the
24 Judges' regulations and their precedent.

25 However, I can make a representation

1 -- I am not a witness and I certainly would not
2 want -- purport to, you know, testify for my
3 witness, and I think that Mr. MacLean can, you
4 know, ask Dr. Gray whatever he would like to
5 ask him, but I can make a representation that
6 MPAA and Dr. Gray did not discover that there
7 was any sort of an issue with the Nielsen data
8 until after Thanksgiving of this year.

9 And that's a representation that I'm
10 making by counsel. And the data that he
11 received, he received December 1st, 2017. So
12 if that is helpful.

13 There is no e-mail correspondence that
14 I'm aware of or other documents. We answered
15 that we produced all of that. That is, you
16 know, an accurate statement.

17 JUDGE BARNETT: Thank you.

18 Mr. MacLean has pretty clearly laid
19 out his cross-examination of Dr. Gray,
20 including what he intends to do. You are
21 fairly warned. If there's any additional
22 conversation you need to have with Dr. Gray or
23 any additional information you need to share
24 with Joint Sports Claimants or any other
25 participant regarding Dr. Gray's changes in his

1 written testimony or errata in his written
2 testimony, then you are advised -- not by the
3 bench, but by Mr. MacLean -- you're advised of
4 what will happen if there is additional
5 information that is -- that goes to the essence
6 of his questions, not only when did Dr. Gray
7 know, which you've just represented, but what
8 did he do about it? What's behind the errata,
9 I think, is what Mr. MacLean is getting to.

10 And you're -- you're warned, fair
11 warned, fairly warned.

12 MS. PLOVNICK: Thank you, Your Honor.

13 JUDGE BARNETT: Thank you.

14 Now, I'm sorry, Mr. Garrett, you were
15 getting ready to say something about your --

16 MR. GARRETT: Yes. And I remember
17 exactly what I was going to say, Your Honor.

18 JUDGE BARNETT: Good for you.

19 MR. GARRETT: The Judges' rules as
20 applied to this proceeding here require the
21 exclusion of witnesses prior to the time that
22 they will testify.

23 My understanding of those rules is
24 that they would not preclude a witness from
25 attending the opening statements. And I have

1 canvassed my colleagues here, and they don't
2 seem to have an objection to our first witness
3 attending the opening statement.

4 Personally, if I was him, I would go
5 back to bed for a couple of hours, but if the
6 Judges have no objection, I'd like to have him
7 stay.

8 JUDGE BARNETT: We certainly have no
9 objection. We've made it plain that, no
10 offense intended, nothing the attorneys say is
11 evidence. So, please, you may proceed.

12 MR. GARRETT: Thank you, Your Honor.

13 JUDGE BARNETT: I don't have the time
14 schedule in front of me.

15 MR. GARRETT: I believe -- I believe,
16 Your Honor, that, by agreement, I will have one
17 hour.

18 JUDGE BARNETT: All right. And do you
19 have somebody keeping time for you?

20 MR. GARRETT: I think I've got six
21 people.

22 (Laughter.)

23 JUDGE BARNETT: Terrific, thank you.
24 Happy Valentine's Day, everyone.

25 MR. GARRETT: It's also the beginning

1 of spring training so we have much to celebrate
2 this week.

3 OPENING STATEMENT BY COUNSEL FOR
4 THE JOINT SPORTS CLAIMANTS

5 MR. GARRETT: So, Your Honors, I am
6 still Bob Garrett, and I still represent the
7 Joint Sports Claimants.

8 My first slide here this morning will
9 give you a bit of a roadmap to my opening. I
10 would like to briefly describe the nature of
11 the Joint Sports Claimants' claim in this
12 proceeding, then identify the witnesses who
13 will be supporting that claim, and then discuss
14 the testimony that they will be providing
15 concerning the major studies that have been
16 offered in this proceeding here.

17 So the next slide sets forth our claim
18 in this proceeding here. If we can just pull
19 it up on the screen there. This is taken
20 directly from our written direct statement
21 memorandum, page 14.

22 Historically, the Judges have
23 allocated the basic fund, the 3.75 Fund, and a
24 Syndex fund separately and by year. But for
25 purposes of simplicity this morning, I would

1 just refer to averages both for our claim and
2 also for the various studies.

3 And as this slide indicates, Joint
4 Sports Claimants are seeking on average for
5 2010-'13, 38.2 percent of the basic fund,
6 41.7 percent of the 3.75 fund, and we make no
7 claim to the Syndex fund.

8 The next slide will show how the claim
9 that we are making this year compares with the
10 awards that were made in the last litigated
11 Phase I or allocation phase of proceeding. Not
12 only for the Joint Sports Claimants but for all
13 of the different parties.

14 And as you can see, our claim of
15 35.2 percent represents a 3 percentage point
16 increase over the award we received in the
17 2004-'05 proceeding. As you can see, the --
18 each of the parties is seeking something
19 greater in the way of an award compare to
20 '04/'05 proceeding, some a little bit more than
21 others.

22 Generally, the parties are five
23 percentage points or less, with the exception
24 of the Public Television Claimants, who are
25 seeking a 13.3 percent increase in their award.

1 If you total up all of our requested
2 awards, you will see it comes to 131.1 percent.
3 And that sort of lays out the problem here,
4 since the Judges only have 100 percent to give
5 out.

6 JUDGE BARNETT: Are you sure?

7 (Laughter.)

8 MR. GARRETT: We're looking for every
9 percentage point we can get, Your Honor. And
10 if it's any consolation, I'll just point out
11 that when these proceedings first started, very
12 many years ago, it was in August of 1980 that
13 we held our first hearing and fought over a
14 fund that was much, much smaller than this one.
15 And our total claims that year actually came to
16 161 percent. So we have made great progress
17 over the last 30 years here.

18 So let me switch to the next slide,
19 which is -- it's where identify our witnesses.
20 We have listed them much in the order that we
21 expect to call them. The only wrinkle here may
22 be that Mr. Singer, who is scheduled third, may
23 have to testify before Dr. Mathiowetz. And
24 that all depends upon when the testimony of
25 Mr. Trautman concludes. But Dr. Mathiowetz

1 cannot be here until next week.

2 As you can see, we have six witnesses
3 who we will be presenting live, Mr. Trautman,
4 Dr. Mathiowetz, Allan Singer, Daniel Hartman,
5 Garrison Harvey, and Dr. Mark Israel. And we
6 have agreed with the other parties to submit
7 our other three witnesses on paper here.

8 I should note, Your Honors, that we
9 also had, in our original testimony, planned to
10 call Mr. Ken Burns. With the scheduling, I'm
11 afraid he has dropped by the wayside here. And
12 we couldn't get the parties to agree to submit
13 his testimony on paper, so he is out.

14 Go to the next slide. Our witnesses
15 are going to testify primarily about the five,
16 what I'll call, global studies that will be
17 offered in evidence in this proceeding. And I
18 refer to these as global studies because they
19 provide shares for all six of the different
20 claimant groups.

21 This slide shows what the different
22 global studies provide in the way of a share
23 for the Joint Sports Claimants. You can take a
24 look at this slide and you can probably guess
25 which one we like the least.

1 (Laughter.)

2 MR. GARRETT: You will see JSC that is
3 sponsoring the first two of these studies, the
4 Bortz cable operator surveys and Israel
5 regression. The Commercial Television
6 Claimants are sponsoring the regression by
7 Dr. Crawford. The Program Suppliers are
8 sponsoring the remaining two studies, the
9 Horowitz cable operator surveys as well as the
10 revised Gray viewing study.

11 The Devotional Claimants are not
12 submitting any study but are critiquing the
13 different studies of the -- that you see up
14 here and have some variations on those.

15 The Public Television Claimants
16 initially submitted a study that simply
17 calculated a share for themselves and did not
18 divide the remaining portion. And they appear
19 now to be relying primarily upon these -- these
20 studies here.

21 And the Canadian Claimants also
22 submitted studies that -- one a cable operator
23 study, as well as a regression analysis that
24 simply carved out a share for themselves and
25 then left the remainder of the pot

1 undifferentiated.

2 So we think that these are the
3 principal studies, the ones up on the slide
4 here, principal in the sense that they purport
5 to provide a basis for allocating the
6 100 percent.

7 And let me note that the parties have
8 kind of sliced and diced all these studies.
9 There are all sorts of different variations of
10 the bottom line results here for various
11 reasons. And I must confess that we've kind of
12 contributed to that as well.

13 But we believe that, at least for the
14 Bortz cable operator surveys, the Israel
15 regression, and the Crawford regression, the
16 numbers that you see here are basically the
17 right numbers. We'll talk about what the
18 numbers should be for Horowitz and Gray.

19 In our view, we rely most heavily on
20 the Bortz cable operator surveys. We think
21 that the Israel regression and the Crawford
22 regression help corroborate the results of the
23 Bortz surveys.

24 The Horowitz cable operator surveys we
25 don't believe you should rely upon. They're

1 flawed in several ways. However, we have made
2 an effort to try to correct some of the flaws,
3 and I think with those corrections, the results
4 of the Horowitz surveys are very close to the
5 results of the Bortz surveys.

6 With respect to Dr. Gray's viewing
7 study, we had thought, frankly, that viewing
8 had been discredited totally in the last couple
9 of -- Phase I proceedings but it has, like the
10 Phoenix, risen from the ashes here again and
11 we'll deal with it in this proceeding here. I
12 will have a little more to say about Dr. Gray
13 later, but first let me talk about the Bortz
14 surveys here.

15 So I think the one thing on which
16 everybody in the room agrees here is the
17 standard. That's relative earmark of value.

18 That the royalties should be allocated
19 the way -- a free marketplace would allocate
20 them so that each of the different claimant
21 groups received essentially the same share of
22 royalties that it would receive in a free and
23 fair marketplace.

24 So beginning back to the 1980s, the
25 Joint Sports Claimants retained Bortz Media and

1 Sports Group to determine the relative values
2 of the different program categories in these
3 proceedings. And Bortz is a market research
4 firm that specializes in the cable, broadcast,
5 and satellite industries. For over four
6 decades, they have been advising clients in
7 this area, many of whom are represented by
8 different parties in this proceeding here, on a
9 variety of issues, including how to value
10 television programming in this evolving
11 marketplace.

12 And Bortz sought to determine that
13 relative marketplace value of the different
14 program categories by surveying cable
15 operators, those that would actually be
16 purchasing the programming in this marketplace
17 here.

18 And we have sponsored Bortz surveys in
19 each of the litigated Phase I proceedings going
20 all the way back to 1983. So that's the 1983
21 proceeding, the 1989 proceeding, the 1990 to
22 '92 proceeding, the 1998 to '99 proceeding,
23 2004-'05 proceeding, now again in the 2010-'13
24 proceeding.

25 And Bortz has, in fact, conducted

1 surveys every year for every year since 1989,
2 regardless of whether the parties have
3 litigated or settled over a particular year.

4 So we'll have two witnesses who will
5 address the methodology of the Bortz survey,
6 Mr. James Trautman and Dr. Nancy Mathiowetz.

7 Mr. Trautman is the managing director
8 of Bortz. And he has been involved in every
9 cable operator survey Bortz has conducted for
10 the Joint Sports Claimants during the past 30
11 years, as well as scores of other surveys for
12 his various media clients. And he will explain
13 basic methodology of the 2010 through '13 Bortz
14 surveys and how it has changed slightly from
15 '04, '05.

16 Dr. Mathiowetz is a survey expert.
17 She has evaluated hundreds of surveys in her
18 more than 30-year career at the University of
19 Wisconsin, University of Maryland, University
20 of Michigan, and she was also past president of
21 the American Association for Public Opinion
22 Research.

23 Now, she has not previously testified
24 in any of these royalty distribution
25 proceedings, but she has testified in many

1 other cases on the issue of whether a survey
2 meets the standards required by the courts.
3 And she will testify that the Bortz surveys do
4 meet those standards as set forth in the
5 reference guide on survey research published by
6 the Federal Judicial Center and National
7 Academy of Sciences.

8 And Mr. -- and as you might imagine,
9 Your Honor, having submitted these Bortz
10 surveys for so many years, there have been a
11 number of witnesses who have testified
12 concerning them, both pro and con. And
13 Dr. Mathiowetz will address much of their
14 testimony, much of which has been already
15 incorporated in the record here by designation,
16 and show how her views relate to that
17 testimony.

18 So with that, let me just briefly talk
19 about the Bortz survey methodology.

20 So Mr. Trautman will explain how the
21 survey was conducted. Essentially, it's a
22 stratified random sample of Form 3 cable
23 systems. The stratification is tied to the
24 Section 111 royalty payments. Telephone
25 interviews are conducted by an independent

1 market research firm that's experienced in
2 interviewing business executives. And they
3 have a response rate that's above industry
4 norms, at 52 to 57 percent each year.

5 The surveys themselves are completed
6 annually between 160 to 170 Form 3 cable
7 systems and those cable systems account for
8 about 28 to 40 percent of all Form 3 royalties
9 each year. Now, that's comparable to what we
10 had in the '04/'05 surveys. The responses are
11 then weighted and the results projectable to
12 the universe of cable systems accounting for
13 98 percent of total royalties here.

14 Mr. Trautman will also -- if we can go
15 to the next slide -- talk about the
16 questionnaires themselves. Essentially, it's a
17 three-part questionnaire.

18 The first is the qualifying question
19 in which the interviewer seeks the person most
20 responsible for programming carriage decisions
21 made by the system under consideration.

22 They then go into warm-up questions
23 where they attempt to focus the respondent on
24 the different program categories that the
25 questions will be asked about. And the program

1 categories actually appeared on the distance
2 signals carried by those particular systems
3 during years in question.

4 And the data for the signals that were
5 carried are taken directly from the statements
6 of account filed by the Copyright -- my bad --
7 the cable systems with the Copyright Office.

8 Warm-up questions are really twofold.
9 One really asks about how important a
10 particular type of programming on those
11 distance signals is to the cable operator, to
12 the cable operator system, and the second asks
13 of the -- how expensive each program type was.
14 And they're just simply rank-order type
15 questions.

16 The final question, which is the key
17 constant sum question, asks that the cable
18 operator allocate a fixed budget, how much they
19 would have spent for each of the different
20 program types. And those program types are
21 intended to correspond to the different
22 categories of programming at issue in this case
23 here.

24 Now, the basic methodology of the
25 Bortz survey has really remained unchanged over

1 the last 30 years, pretty much as I pointed out
2 here, but Bortz had throughout this period
3 continuously attempted to refine and improve
4 the survey primarily to address issues that
5 have been raised in these proceedings by -- by
6 your predecessors and the parties, as well as
7 to deal with marketplace changes, because the
8 marketplace today is not the same as it was
9 when these surveys were first conducted.

10 Mr. Trautman and Dr. Mathiowetz will
11 explain the specific changes that were made in
12 the surveys for 2010 through '13, but let me
13 just focus on one that I think is particularly
14 significant and which they will also discuss.

15 So as we will hear from Mr. Trautman
16 and from other witnesses in this proceeding,
17 the most widely carried distance signals during
18 the years 2010 to 2013 was WGNA out of Chicago.
19 It reached over 40 million cable subscribers
20 each year. No other station had more than
21 about 1 million cable subscribers on a distant
22 basis. Over 80 percent of all cable
23 subscribers who received a distance signal in
24 those years received WGN as either its only
25 distance signal or as one of other -- of

1 several distance signals.

2 And just by way of comparison, if you
3 look at all the distant public television
4 stations, only 16 percent of all the cable
5 subscribers who received distance signals
6 received a distant public television signal
7 with most of the viewing public television
8 coming on local signals. And for Canadians,
9 the comparable number would have been less than
10 5 percent.

11 One other piece of relevant
12 information here concerning WGNA concerns the
13 amount of fees that they generated and that's
14 shown in the next slide here. As you can see,
15 in the year 2004-'05, WGNA generated
16 63.1 percent of the fees, and by 2010 through
17 '13, that amount had grown to 75.1 percent.
18 And I think it's a pretty significant
19 development and one too that's also relevant
20 here because what you'll see in the next
21 proceeding, which is just down the track here,
22 is that WGNA will disappear from the equation
23 here because it will convert into a cable
24 network and no longer be generating royalties.
25 So these really were the heyday of the WGNA

1 and, in our view, the programming that was on
2 WGNA.

3 Let me also say one thing about fee
4 generation, which has been an issue in these
5 proceedings for many, many years, and we'll all
6 at some point in time go back and sort out what
7 has been said. But in our view, fee generation
8 serves as a good reality check on the amounts
9 of royalties that ought to be allocated to the
10 programming on public television stations, on
11 Canadian stations, and on U.S. commercial
12 stations here.

13 And as you can see, showing the
14 significance of WGNA during these years, their
15 share of fee generation had grown quite
16 substantially here.

17 So going back to the change that was
18 made in the 2010 to '13 survey, in prior years
19 a very significant issue had arisen concerning
20 the compensable programming on WGNA. Not all
21 of the programming on WGNA is compensable in
22 these proceedings. To be compensable, it has
23 to be both broadcast on the local over-the-air
24 station in Chicago and also transmitted over
25 satellite simultaneously. And over the years,

1 the amount of programming that was compensable
2 that was being broadcast simultaneously had
3 decreased.

4 So when we conducted the surveys in
5 prior years, respondents were simply asked to
6 value the programming on WGNA without any
7 indication of what was or what was not
8 compensable.

9 And the Judges in the past litigated
10 proceeding in the CARP before that noted that
11 this really had the effect of inflating the
12 shares of the Program Suppliers and the
13 Devotional Claimants at the expense of JSC and
14 the Commercial Television Claimants.

15 And why is that the case? Because all
16 of the non-compensable programming on WGNA was
17 in the Program Suppliers or the devotional
18 categories here. And what's important to note
19 there is that the Copyright Owners of that
20 programming got their compensation in the
21 marketplace dealing directly with WGNA. And
22 that's why they were not eligible -- well, and
23 as a result, also were not eligible then to
24 share further in the Section 111 royalties.

25 One change that was made with the

1 survey this year was to try to get a better
2 handle on how much of that programming -- or to
3 have the respondents focus better on what was
4 compensable and what was not compensable.

5 And so if we can just switch to the
6 next slide, one of the changes was that before
7 the respondent was interviewed, it would be
8 given a program summary showing exactly which
9 programming on WGNA was compensable and which
10 programming they should value.

11 If you look at this program summary
12 chart here, you'll see that the respondents
13 were asked to value programming in the news and
14 other stations produced category. And then the
15 summary identifies which programming that was.

16 Live professional team sports, so
17 they're asked specifically about the Cubs
18 baseball, White Sox baseball, Bulls basketball.
19 There are syndicated shows. The only thing
20 that was on WGN that year was 30 Rock. And
21 otherwise a lot of infomercials. And then
22 there were movies and devotional programs.

23 So this program summary ended up going
24 out to about just under 30 percent, I think
25 27 percent, of the respondents. Those who

1 carried WGN as their only distance signal.

2 And I think it should have been clear,
3 in those interviews particularly, what was and
4 what was not compensable, also would have been
5 clear what was in each of these different
6 program categories.

7 Now, this change doesn't totally solve
8 the problem because there were other systems
9 that carried WGN additional signals. And for
10 the reasons that Mr. Trautman will explain, the
11 summary was not sent to them. They were asked
12 the standard question which simply asked them
13 to allocate the program budget based upon the
14 general categories here.

15 So let me just briefly talk about the
16 results of the 2010-'13 surveys, which
17 Mr. Trautman will testify about. They're put
18 up on the next slide here.

19 And as you can see, the Joint Sports
20 Claimants' share increased from 35.2 percent in
21 2004-'05 to 38.2 percent. And that's our
22 claim, for 38.2 percent. As I said earlier,
23 it's a three-percentage point increase. That's
24 what's picked up in this survey.

25 And I should note that over the years

1 we have consistently requested our share of
2 Bortz. Sometimes that has worked for us;
3 sometimes it has worked against us. In the
4 last proceeding, we actually went down 3
5 percentage points because that's with the
6 Bortz. It was a pleasant call with the client,
7 to tell them we had gotten exactly what we
8 asked for, a three-point decrease in our award.
9 But this time it works in our favor, and so
10 we're asking for that increase.

11 You can see how it has changed for all
12 the other parties. And one thing I want to
13 note, I think in particular here, is you'll see
14 that both the Joint Sports Claimants' and the
15 Commercial Television Claimants' shares go up a
16 little bit; whereas the Program Suppliers' and
17 the Devotional Claimants' go down.

18 And, you know, frankly, with the
19 change that was made in the methodology by
20 giving a more complete definition of exactly
21 what programming is compensable, that's exactly
22 the change you would have expected in the
23 survey results here. And it's exactly the
24 change that the Judges had suggested would
25 happen if the respondents more clearly

1 understood what programming was and was not
2 compensable.

3 You will also note that the Public
4 Television Claimants go up by 1.5 percentage
5 points. And that's not their 13 percentage
6 point increase that they are seeking here, but
7 it does show an upward trend. And we
8 acknowledge that their share also should go up
9 by a small amount. The amount that it goes up
10 actually is very consistent with the rise in
11 the amount of fees generated, their share of
12 fees generated in this -- during these years
13 here.

14 Now, you'll hear Program Suppliers
15 Claimants talk about how, well, this can't be
16 right that we would go up at a time when
17 there's all this migration of sports
18 programming off of broadcast signals on to
19 other forms of medium.

20 But the important point to remember
21 here is that we're dealing here in a very
22 distinct marketplace here. We're dealing with
23 a non-network distance signal marketplace,
24 okay, not the broader marketplace. Whatever
25 migration there may or may not have been in

1 that broader marketplace, it has not affected
2 our share of this distance signal non-network
3 marketplace.

4 And this is reflected in the next
5 slide, which you will see is taken out of the
6 testimony of Dr. Israel, where he compares the
7 '04, '05 -- you know, our share was
8 4.5 percent, just on a pure volume basis, and
9 grown to 5.9 percent.

10 The biggest change, of course, is with
11 the Program Suppliers, who go down from
12 50.1 percent to 33.3 percent. So to the extent
13 -- oh, and if we can just switch to the next
14 slide here, part of the reason for that change
15 is directly related to the amount of
16 compensable programming on WGNA.

17 In 2004-'05, you saw that the Program
18 Suppliers had -- over 57 percent of the
19 compensable programming was theirs, was on a
20 purely tied basis. And by the 2010 through '13
21 period, that had declined to 21.6 percent. And
22 during the same period for sports, we had gone
23 from about 14 percent to up to 28 percent here.

24 So what this is reflecting is that if
25 migration is an issue, the real migration here

1 is on the Program Suppliers' side, taking
2 programming out of the Section 111 fund here
3 and putting it into an area where they can
4 directly negotiate their own payments.

5 So in addition to providing testimony
6 about the methodology of the 2010 through '13
7 Bortz surveys, we're going to present two
8 witnesses from the cable and satellite
9 industry. Each have had significant experience
10 valuing programming television. That's
11 Allan Singer and Dan Hartman.

12 Mr. Singer worked for over 20 years as
13 a programming executive for some of the
14 nation's largest cable system operators, which
15 includes Charter, where he was the senior vice
16 president of programming during the relevant
17 years here, 2011 through 2013. And Charter
18 operated a number of cable systems. It was in
19 the top five or so cable systems -- multiple
20 system operators that year.

21 And Mr. Hartman spent 15 years at
22 DirecTV until January 2013, where he was also
23 the senior vice president of programming and
24 acquisitions.

25 He was on the satellite side, not the

1 cable side, but as he will explain to you, he
2 was there competing with the cable guys for the
3 same programming, negotiating rights over the
4 same programming, and they were both going
5 after the same people, same subscribers here.
6 And he has considerable experience in that
7 area.

8 Indeed, they both were responsible for
9 negotiating the rights to carry television
10 programming generally, and as part of that
11 responsibility, they necessarily had to
12 determine how to allocate a fixed programming
13 budget among cable networks and broadcast
14 networks, so essentially the same task that the
15 Bortz respondents faced, the same task that you
16 face, albeit in the distance signal context in
17 our case here.

18 So what Mr. Singer and Mr. Hartman
19 will testify is how they went about valuing
20 different types of programming. And they will
21 explain why the 2010 to '13 Bortz survey
22 results make sense and why it is that the
23 marketplace values Joint Sports Claimants'
24 programming as highly as it does and as
25 reflected in the Bortz surveys and the

1 regressions.

2 They will testify that JSC programming
3 plays a unique and pivotal role in retaining
4 subscribers and allowing price increases for
5 multi-channel video programming distributors.
6 It's because it's live, it's current, it has a
7 passionate fan base. It has all the qualities
8 that kind of differentiate it from general
9 entertainment programming, which is very widely
10 available. It is not as widely available and
11 it's not available from multiple sources the
12 way other programming is.

13 And all of that makes it what they
14 will refer to as must-have programming, which
15 means that if you don't have it, you're going
16 to lose subscribers.

17 Let me make one final observation
18 about the 2010 to '13 Bortz studies. And we
19 believe that not only will record evidence
20 support grounding the allocations in the
21 2010-'13 Bortz results but precedent will
22 support that as well.

23 So in the last litigated proceedings,
24 the Judges found that -- and I'm quoting here
25 -- "the Bortz study to be the most persuasive

1 piece of evidence provided on relative value."

2 And they also concluded that -- again
3 quoting -- "the Bortz intervals certainly
4 marked the most strongly anchored range of
5 relative programming values produced by the
6 evidence in this proceeding."

7 And if you go back to the litigated
8 proceeding before that, where you had the CARP
9 allocating the 1998-'99 royalties and follow
10 the same approach which was affirmed by the
11 Register of Copyrights, the Librarian, and the
12 D.C. Circuit.

13 If you look at the next slide here,
14 you'll see basically the -- how in the '04-'05
15 proceeding, the awards matched up with the
16 Bortz results. And I think as these slides
17 suggest, the Judges did not just mechanically
18 take the Bortz results and convert those into
19 Bortz shares -- into royalty awards.

20 It looked at those results in light of
21 all of the different record evidence that was
22 relevant and made adjustments accordingly here.
23 And that included things such as the
24 non-compensability of program suppliers and
25 devotional programming on WGNA, included fee

1 generation issues, and the fact that, as we
2 acknowledge, the Bortz surveys need to be
3 adjusted to account for not interviewing all
4 systems or systems that would carry only public
5 television stations or only Canadian stations
6 and therefore not have a basis to compare them
7 to all of the different program categories.

8 But one thing I want to emphasize
9 here, Your Honors, is that as I -- well, let me
10 just emphasize that we are not asking that you
11 follow this approach here simply because your
12 predecessors followed it. And we're asking
13 that you follow it because it makes sense and
14 because the record is going to support doing
15 the same thing, as well as precedent here.

16 Let me then talk for a moment about
17 the other studies here. As I mentioned
18 earlier, there are two regressions that have
19 been placed into the record here, one from
20 Dr. Israel of Compass Lexecon, who did his
21 study in consultation with Dr. Michelle
22 Connolly, who is a former FCC chief economist
23 and now a professor at Duke University. And
24 neither Dr. Israel nor Dr. Connolly has
25 testified previously in these proceedings or

1 submitted evidence, I think, to the Judges at
2 any time.

3 The second regression comes from
4 Dr. Crawford, which CTV is sponsoring. Both
5 studies examine the relationship between the
6 Section 111 compulsory licensing royalties paid
7 by cable systems and the mix of compensable
8 programming or distance signal programming that
9 these systems carry.

10 Both of these studies were conducted
11 entirely independently of each other, and they
12 reflect some differences in technical
13 methodological choices, but they both come to
14 relatively comparable conclusions.

15 In particular, they both show, like
16 the Bortz survey, that the JSC category is the
17 most highly valued of the six program
18 categories and receives an overall valuation
19 that's very close to the Bortz numbers.

20 So as I noted earlier, the Israel
21 regression shows a JSC valuation of
22 37.5 percent compared to the Bortz share of
23 38.2 percent. Crawford's comparable share for
24 JSC is 35.1 percent.

25 Let me just briefly explain the

1 purpose of at least the Israel study as we see
2 it. In the last two litigated proceedings, the
3 Commercial Television Claimants introduced the
4 only regression analysis.

5 The first was conducted by Dr. Rosston
6 in the 1998 to '99 proceeding; and the second
7 was conducted by Dr. Waldfogel in the '04-'05
8 proceeding. So both the CARP and the Judges in
9 those proceedings concluded that neither
10 regression provides the best estimates of
11 relative market value, but they also found that
12 the regressions helped corroborate the results
13 of Bortz with observable marketplace behavior.

14 And that fact gave your predecessors a
15 little greater comfort in relying upon the
16 Bortz results. So we couldn't assume that
17 Commercial Television was going to conduct a
18 third regression analysis, and we knew that the
19 Judges, at least your predecessors, had
20 considered a regression analysis to be useful
21 in at least the last two proceedings.

22 So we asked Dr. Israel to essentially
23 replicate the Waldfogel analysis so that you
24 would have the type of evidence before you that
25 your predecessors had at least in the last two

1 proceedings.

2 And the bottom line, at least from our
3 perspective, is that both studies do
4 corroborate the Bortz results. And so in this
5 proceeding, you would have two studies, not
6 just one regression analysis, that helps give
7 you greater confidence in those results.

8 So let me just pause for a moment and
9 give you a quick summary of the case, our
10 affirmative case, that we think will be before
11 you.

12 One, we are relying primarily upon the
13 results of the 2010-'13 Bortz surveys as we
14 have in prior years. We believe evidence is
15 going to show that those surveys meet federal
16 court standards for introduction and admission
17 of survey research.

18 There were specific design
19 improvements in 2010-'13 that were intended to
20 reflect issues raised in past proceedings, as
21 well as changes in the marketplace over the
22 last several years.

23 Those results are corroborated by the
24 two regressions, one that we did and one that
25 another party did. These results are also

1 consistent with marketplace behavior.

2 The awards are anchored in the Bortz
3 results during the last two litigated
4 proceedings, and then 30 years of experience
5 with conducting and strengthening Bortz
6 surveys. Well, why is that relevant?

7 I think it's relevant in much part
8 because they've been through this process now
9 year after year after year and proceeding after
10 proceeding after proceeding. And at each of
11 these proceedings, as you can imagine, nobody
12 simply allows them a free pass. There's
13 criticisms, there's analysis, there's
14 valuations that are done by the parties, that
15 have been done by the Judges.

16 And, frankly, there is not a criticism
17 you're going to hear this year that hasn't been
18 made at some point in the past. It is all old
19 wine in new bottles, and the vintage was never
20 very good on any of it.

21 But what you will see is our witnesses
22 will respond to those criticisms, and you will
23 have to evaluate them again, but what we really
24 have, you know, is this is sort of like
25 groundhog day here again in this proceeding

1 here as, once again, we deal with the same,
2 same criticisms that have been leveled before.
3 And they have tried to respond to the
4 criticisms that have been made to improve the
5 product, to give you a better and more reliable
6 basis on which to base your decisions here.

7 JUDGE STRICKLER: In the movie
8 Groundhog Day, didn't it change in the last
9 scene?

10 (Laughter.)

11 MR. GARRETT: Well, we're going to
12 make certain it doesn't happen again.

13 JUDGE STRICKLER: Maybe I misremember
14 the movie.

15 MR. GARRETT: No, from -- what I think
16 you should to know is if you want to see
17 Groundhog Day, you don't need a distance signal
18 to see it. There's plenty of other sources for
19 that.

20 (Laughter.)

21 MR. GARRETT: Let me switch briefly
22 now to the Horowitz cable operator surveys, the
23 competing surveys here. So in the '04-'05
24 proceeding the Program Suppliers offered a
25 survey of cable subscribers to the Judges, and

1 the Judges found the survey to be marginally
2 helpful and appeared to welcome the submission
3 of subscriber surveys in the future but with
4 improved methodology.

5 But the Program Suppliers have
6 abandoned that approach and now they've come
7 before you with a cable operators survey and
8 have jettisoned the cable subscriber survey.
9 And that's fine because now with the
10 introduction of the Horowitz surveys, every
11 party in this proceeding here has now either
12 sponsored or supported a survey of cable
13 operators based upon the constant sum
14 methodology. I'm not saying they all support
15 Bortz, but they've all come with that same kind
16 of methodology as the best way for the Judges
17 to allocate royalties with or without
18 adjustments.

19 Now, Mr. Horowitz says that his survey
20 was designed to carefully replicate the method
21 and procedures of the '04-'05 Bortz surveys.
22 And indeed he does. He replicates much of the
23 procedures that the Bortz surveys have found
24 over the years.

25 And I think the fact that he did make

1 the same methodological choices as Bortz in
2 many cases should also give you greater
3 confidence in relying upon the Bortz surveys or
4 at least the methodology that the Bortz surveys
5 produce here.

6 He also had results that are somewhat
7 similar to the JSC -- or, excuse me, the Bortz
8 surveys, at least for the JSC category. It is
9 the most valuable program type.

10 When you add up, they give themselves
11 three categories of programming, three types of
12 programming in the proceeding. And then
13 Program Suppliers get the highest, but as a
14 single program type, even in the Horowitz
15 survey, live professional college team sports
16 is the most valuable and the most important of
17 the programming.

18 But as Dr. Mathiowetz and Mr. Trautman
19 will explain, the Horowitz surveys contain
20 several flaws and are not reliable and valid.
21 And the problem is really twofold. You know,
22 Number 1 is that Horowitz did replicate the
23 '04-'05 methodology without making the kinds of
24 changes and improvements that Bortz made for
25 2010 through '13.

1 The other is that he did make changes,
2 and those changes are problematic. And both
3 Dr. Mathiowetz and Mr. Trautman will explain
4 that in greater detail, but let me just focus
5 on one -- or actually three of the flaws that
6 are particularly troublesome.

7 One is on WGNA compensable
8 programming. They really didn't address that
9 issue. They say they did because there's an
10 instruction in the survey that says don't
11 assign any value to programs that are
12 substituted for WGN's blacked-out programming.
13 There's no way the respondents knew which ones
14 were substituted and which ones were not
15 substituted.

16 And that's exactly why Mr. -- or the
17 Bortz folks had come up with the program
18 summary so that they would know exactly which
19 programs were substituted and not substituted.
20 So it still contains the same problem that the
21 older Bortz surveys had here.

22 Let me discuss together just the other
23 sports and program examples, which is perhaps
24 best illustrated by the next slide here.

25 So the records will show that the

1 Horowitz surveys asked respondents to give a
2 value for the other sports programming
3 supposedly imported by 691 cable systems during
4 2010 through '13. So 691 systems asked to
5 value other sports here.

6 And that other sports category was
7 then assigned to the Program Suppliers, in
8 addition to their syndicated shows and their
9 movies. So they have three categories. And I
10 think the category was meant to encompass
11 sports that are not within the JSC claim here.

12 So what the evidence will show is that
13 for 45 percent of those 691 systems, the only
14 sports they carried on a non-network distance
15 signal basis amounted to two hours or less each
16 year. It was two hours in 2010. All they were
17 carrying was some wrestling reruns, two hours
18 of wrestling reruns. In 2011 it was a
19 30-minute horse race. In 2012 and 2013, same
20 horse race, but they now televised it for one
21 hour. So they asked all of those
22 respondents -- I mean that's all they're
23 carrying in the way of sports. They asked them
24 to give you an other sports valuation.

25 Again, as Dr. Mathiowetz and

1 Mr. Trautman will testify, it was simply
2 improper to add an entirely separate category
3 for so little of their sports programming.

4 But the problem is actually worse than
5 that. They compounded the problem by telling
6 some of the respondents that the programs
7 listed in this slide are simply examples of
8 other sports programming systems supposedly
9 imported on distance signals.

10 But they're not examples. I mean,
11 they are the only programs that they imported.
12 And there wasn't very much of them.

13 Other Horowitz respondents were told
14 the examples of other sports were NASCAR and
15 figure skating. They carried no NASCAR or
16 figure skating on a non-network distance signal
17 basis here.

18 So as Dr. Trautman -- or
19 Dr. Mathiowetz and Mr. Trautman will explain,
20 the Horowitz surveys, through the use of these
21 program examples, affirmatively misled the
22 respondents into believing that they were
23 importing a lot more other sports than they
24 were, in fact, importing.

25 So, look, we have to acknowledge we do

1 not have all sports programming, what the
2 layman would consider sports programming in our
3 category. There are some other sports. And in
4 the larger, bigger marketplace that we talk
5 about, that programming would be very
6 prominent. The Olympics, okay? Golf or
7 tennis. That programming you're going to find
8 on the broadcast networks. You'll find it on
9 cable networks.

10 You're not finding it in any
11 significant degree in the distance signal
12 non-network marketplace, which is the
13 marketplace we're trying to value here.

14 Dr. Gray will tell you that, well --
15 he looks at his analysis and he looks at his
16 data and he says, well, "other sports"
17 constitutes almost 30 percent of the broader
18 sports category. He gets to that number by
19 simply taking each minute of programming in his
20 sample stations that he says is "other sports"
21 and comparing it to the sports in the JSC
22 category, without taking into account at all
23 the number of subscribers who receive that
24 programming on a distance basis.

25 I think if you want to understand what

1 the volume of programming is and the miniscule
2 volume of other sports that's out there, you
3 really need to take a look at where is this
4 programming going?

5 And we had in the Phase II case a
6 claim by our good friends from IPG for a single
7 charity golf and tennis tournament. And that
8 kind of program should be compensated for, but
9 the important thing is -- to remember is that
10 program was like on one station or two
11 stations, got carried by a couple thousand
12 different -- to a couple thousand different
13 subscribers.

14 In the relevant non-network distance
15 signal marketplace, you will find and the
16 evidence will show that other sports presence
17 is de minimis here.

18 Let me just briefly turn now to my
19 final section here, which is on Dr. Gray and
20 his study.

21 JUDGE BARNETT: How are we doing on
22 time?

23 MR. GARRETT: I should have about ten
24 minutes.

25 JUDGE BARNETT: Okay, thank you.

1 MR. GARRETT: They're giving me 15. I
2 was only going to take ten.

3 JUDGE BARNETT: Okay. Well, ten will
4 do.

5 (Laughter.)

6 MR. GARRETT: I'm almost there, Your
7 Honor.

8 So Dr. Gray says that relative viewing
9 of programming, as he calculates it, equates to
10 the relative value of that programming. And so
11 Program Suppliers tie their claim directly to
12 Dr. Gray's viewing study. And they're the only
13 party, I believe, to do so, even though some
14 parties actually do better under Gray's study
15 than some of these others.

16 We don't believe the evidence will
17 support the claim that relative viewing of any
18 of these categories equates to relative value.
19 And that's basically the conclusion that had
20 been reached in the prior proceedings here.

21 And let me give you just one example
22 of the disconnect between viewing and value.
23 And it comes from the testimony of Dr. Israel,
24 who looked at the amounts that cable networks
25 spent for programming.

1 So the information depicted in this
2 next slide is taken directly out of
3 Dr. Israel's testimony. And what it shows is
4 that -- it provides information about TBS,
5 which was actually the very first superstation,
6 the first most widely carried distance signal
7 years ago.

8 And what you see is that on TBS, the
9 JSC programming accounts for a little less than
10 2 percent of the time in terms of total hours.
11 And if you want to measure their viewing the
12 way it had been at least in the past under
13 household viewing hours concept, average
14 audience times number of hours that the program
15 is on, it amounts to about 6 percent of the
16 time.

17 But when you look at how much TBS
18 actually spent for that programming compared to
19 all of its other programming, they allocated
20 over 44 percent of their programming budget to
21 that JSC programming and the remaining
22 56 percent to the programming that occupied
23 98 percent of the programming hours.

24 So it's not an isolated example.
25 We'll have other examples like this that will

1 be in the record and come from Dr. Israel, as
2 well as other witnesses.

3 But the point which has been
4 acknowledged in past proceedings is you cannot
5 simply go from a viewing share to a value share
6 on a relative basis. They do not correspond
7 one-on-one. And we believe that's what the
8 evidence will show here.

9 And I should note that, remember the
10 slide we had back previously here, our share of
11 the distance signal marketplace is actually
12 greater than it is on TBS here.

13 The -- even if one assumed that
14 viewing has some relevance to the issues before
15 the Judges, the Gray study does not provide a
16 valid and reliable measure of that viewing. So
17 I hesitate to venture into Mr. McLean's
18 controversy here, but a little bit of this is
19 relevant, and that is in September of last year
20 we submitted a report from William Wecker
21 Associates, which is a statistical and applied
22 mathematical consulting firm that has
23 substantial experience analyzing complex
24 databases.

25 And we asked them to analyze the Gray

1 database. And they went through it and in
2 their report demonstrated that the data on
3 which Dr. Gray was relying could not possibly
4 be correct.

5 Among other things, Gray purported to
6 show that there was virtually no distance
7 signal viewing of any of the programming on
8 WGNA, even though it was reaching 40 million
9 cable households on a distance signal basis.
10 Indeed, in the Gray data for the year 2013, the
11 Wecker report showed that Gray was relying upon
12 one household viewing one hour of programming.
13 I'm happy to report it was a Bulls game that
14 they were watching. But the conclusion was
15 that it could not possibly be correct.

16 Now, I heard that, well, he didn't
17 find out about it until Thanksgiving or
18 something, and that may very well be the case,
19 but in the record as of September 15th, 2016,
20 there was evidence that would make anybody say:
21 Did I get the right data? Did I get the right
22 data here?

23 And it clearly was not.

24 So it took four months and he --
25 although he never says that he had the wrong

1 data, it's really counsel who says that they
2 had the wrong data, he redoes his report. And
3 he corrects the data.

4 And I think we now acknowledge that we
5 do have robust viewing data for WGNA, but not
6 for the other signals that comprise his study
7 here. He corrected that data.

8 The next slide shows the progression
9 here. So when he submitted his first study in
10 April 2017, it showed that the Program
11 Suppliers' share was 45.7 percent. And he did
12 that applying no weights, did a single
13 regression, original WGNA data.

14 He corrects it in January of this
15 year, corrects the WGNA data, but he also
16 changes the methodology because now he's using
17 weights and he's now using two regressions
18 rather than one regression.

19 Well, what the Wecker folks found when
20 they went through the database again here is
21 that he simply corrected the error, the
22 erroneous WGNA data, and didn't make those
23 other changes in methodology. The Program
24 Suppliers' share would be 34.3 percent, which
25 is actually within about 1 or 2 points of their

1 Bortz share here.

2 So we'll explore more closely
3 throughout the proceeding the changes in
4 methodology and the other factors that went
5 into Dr. Gray's testimony here.

6 But the thing that I want to make
7 clear is that this study itself, even with the
8 corrections that he has made, is still not
9 reliable or valid.

10 A couple of things will emerge from
11 the testimony. You know, first, is that he is
12 relying upon Nielsen people meter day. And
13 what our witnesses will testify and witnesses
14 from other parties will testify is that he's
15 using that data for a purpose that it was never
16 intended.

17 Nielsen national people meter data is
18 intended to provide viewing of nationally
19 distributed programs. It is appropriate to use
20 it to see what kind of viewing is on WGNA, but
21 not for signals that are reaching 1,000
22 subscribers or 10,000 subscribers or even
23 millions of subscribers. Distance signal
24 viewing, which is the issue that's in this
25 proceeding here. All right?

1 So he relies upon the wrong data and
2 you can see that in the next slide here, the
3 inadequacy of that data. Dr. Gray sought
4 distant viewing data from Mr. Lindstrom for
5 approximately 17.4 million quarter hours. But
6 as Mr. Harvey will show, from Wecker
7 Associates, he only got viewing data for
8 6 percent of those hours; for 94 percent of the
9 hours, he had no data. Okay? That's not
10 surprising because, again, Nielsen national
11 people meter data, not intended to reflect
12 distance viewing.

13 Dr. Gray appears to believe that he
14 can bypass the absence of data by using
15 multiple regression analyses. But as
16 Mr. Harvey will explain, the outputs of
17 multiple regression analyses are only as good
18 as the inputs. And the inputs that Dr. Gray
19 received were simply not reliable because he
20 used MPM here.

21 And that's sort of reflected in the
22 next chart, which you'll be happy to note is my
23 last. That essentially the shares pre- and
24 post-regression for each of the different
25 categories is not all that different. My good

1 friends, the Commercial Television Claimants,
2 will probably disagree because they really take
3 a hit of about 5 percentage points.

4 But mainly after you run it through
5 the multiple regressions here, it's really
6 coming back and mirroring the same data that
7 was going in originally. The regressions don't
8 really do anything. And that is, as I say,
9 because as Mr. Harvey will testify, you can't
10 use the regressions to deal with bad data. And
11 that's what he had.

12 So I don't mean to say that our
13 criticisms of Dr. Gray's study are confined to
14 the ones I just said. There will be more that
15 we'll explore during the course of the
16 proceeding here. But, again, we think that as
17 in the past proceedings they should again be
18 rejected.

19 So really, in conclusion, what we're
20 asking is that you anchor our award and the
21 awards of other parties in the Bortz surveys,
22 and both the precedent and record will support
23 that. Neither the record nor precedent is
24 going to support reliance upon the Horowitz
25 surveys or the revised Gray viewing study.

1 And in the final analysis, JSC should
2 receive an award that is commensurate with the
3 2010-'13 Bortz results.

4 And with that I'll end.

5 JUDGE BARNETT: Thank you,
6 Mr. Garrett.

7 MR. GARRETT: Thank you, ma'am.

8 JUDGE BARNETT: We're going to take a
9 15-minute recess at this point, and then we
10 will go straight through. We will take our
11 lunch break after noon, not in the afternoon,
12 but past 12:00 noon to be sure we get the first
13 three opening statements done before the noon
14 recess, and then we will finish up in the
15 afternoon.

16 So 15 minutes.

17 (A recess was taken at 11:04 a.m.,
18 after which the trial resumed at 11:23 a.m.)

19 JUDGE BARNETT: Please be seated.

20 Mr. Stewart, you are up.

21 OPENING STATEMENT BY COUNSEL
22 FOR THE COMMERCIAL TELEVISION CLAIMANTS

23 MR. STEWART: Good morning, Your
24 Honors. My name is John Stewart and we're here
25 representing the Commercial Television

1 Claimants group.

2 And I want to say, wholly apart from
3 the fact that we get to spend Valentine's Day
4 with you, we are very pleased, finally, to be
5 here with you to begin the process of providing
6 the evidence that you need to determine the
7 allocation of the 2010 to '13 royalties.

8 And I want to make a brief
9 clarification on the record, given the labels
10 of the tables here, because -- and just to
11 avoid any confusion. We are actually -- our
12 law firm is actually retained by the National
13 Association of Broadcasters, which is a
14 national association that represents
15 broadcasters' interests here.

16 But they retain us to represent the
17 interests of the commercial television
18 category. And that commercial television
19 category encompasses all U.S. commercial
20 television stations that were retransmitted as
21 distance signals during the particular period,
22 whether or not they are members of the National
23 Association of Broadcasters.

24 So we have been -- in prior
25 proceedings our category has been referred to

1 as NAB, but that's a bit imprecise. And I
2 think in that respect we're very much like the
3 Program Suppliers and Public Television and
4 other claimants, that there is an entity that
5 sort of guides the litigation, but here in this
6 proceeding we're representing all U.S.
7 commercial television stations carried as
8 distance signals.

9 JUDGE BARNETT: Thank you.

10 MR. STEWART: And now I'd like first
11 to describe our programs, the programs within
12 our category a bit, and then tell you how we
13 approach this case.

14 After providing then a bit of history,
15 which we think is important context for this
16 proceeding, I will then go on to describe our
17 case in more detail and our witnesses and what
18 you should expect to hear from them.

19 And then at the end I will identify
20 and explain a claim that we're going to be
21 making here.

22 And I don't know, I don't want to make
23 any assumptions about how much television you
24 all watch, so I will proceed with kind of
25 trying to describe what the program schedule is

1 like on a commercial television station.

2 It is a mix of programs that are
3 acquired by the stations and programs that were
4 created or produced by the stations. And so
5 the programs acquired from other owners include
6 network programs, syndicated programs, sports
7 games licensed by the teams, and paid
8 programming, infomercials and other kinds of
9 programs where the program owner actually pays
10 the station to run their program on the
11 station.

12 The programs are selected and created
13 to meet the demands of viewers in the local
14 market. The local market is something called a
15 DMA, which is defined by Nielsen, because it is
16 the area within which the local market viewing
17 is reported.

18 And that's very important, obviously,
19 to commercial television broadcasters whose
20 principal economic driver is the sale of
21 advertising time.

22 Now, our claim here is for the
23 programs that fit within this agreed
24 definition. And it says: Programs produced by
25 or for a U.S. commercial television station --

1 that's us -- and broadcast only by that station
2 during the calendar year in question.

3 The rest of the clause has to do with
4 some exceptions that used to be relevant back
5 in the '80s and we don't actually have many, if
6 any, of them in this point.

7 But you will see that the definition
8 itself is slightly different from the other
9 categories, some of the other category
10 definitions, in that it is an identification of
11 source, rather than necessarily the nature of
12 the programs.

13 And as you will hear from our
14 witnesses, commercial television stations
15 produce a variety of kinds of programs that
16 include public affairs programs, sports
17 programs like coaches shows and previews of the
18 upcoming season for pro teams, pre-game shows,
19 post-game shows, high school games.

20 But by far the most predominant type
21 of program that falls within our category and
22 our claim are live daily television newscasts.

23 These newscasts air in the morning,
24 mid-day, evening, late night. They typically
25 feature the station's own news anchors and news

1 reporters. They cover a wide variety of news,
2 local, regional, national, sports, weather,
3 human interest stories and the like.

4 The station's newscasts are often
5 branded, for example, Eyewitness News or Action
6 News, or the like, and promoted by the station
7 as an identifier for the station itself.

8 Now, these commercial television
9 programs are unique by definition because,
10 unlike most of the other categories, once -- if
11 a program is available anywhere else, if it
12 airs on other stations, it is not in our
13 category any longer. So the newscasts air only
14 on the particular station that is being carried
15 as a distance signal and nowhere else.

16 They also are a kind of programming, a
17 kind of signature programming. Because of the
18 promotion and the like that is done, that
19 creates a unique identity, an identity for the
20 station, so that you know that a station is the
21 Eyewitness News station or the, you know, the
22 Channel 4 Storm Team station or the like. All
23 those things are ways in which the stations
24 have a signature identity.

25 Now, this case, of course, is only

1 about distant signals. And that means this
2 local television station, this commercial
3 television station, is now retransmitted by a
4 cable system that is in a different DMA.

5 By and large there are some other
6 rules where even if in another DMA you can
7 still be local, but it is basically that
8 retransmission in a different DMA.

9 Carriage of our stations, of the
10 members of our group, commercial television
11 stations, within their home DMA is not at issue
12 at all in this case. It is only when they are
13 retransmitted outside the DMA.

14 And I invite you, please, to ask me
15 any questions if I am not clear. I hope it is
16 not "are we done yet?" But other questions I
17 welcome.

18 (Laughter.)

19 And, by the way, I am scheduled for 45
20 minutes and I'm going to use less than that.

21 So how do we approach this case? To
22 put it simply, the only job here is to divide
23 up the royalties that were actually paid in
24 2010 to '13 among the programs that were
25 actually carried in 2010 to '13.

1 The cable system operators, or CSOs,
2 choose -- choose channels of programming. This
3 doesn't just -- this doesn't just relate to
4 distance signal carriage. It relates to all of
5 their programming.

6 During this time period cable CSOs
7 offered on average something in the range of
8 400 stations -- sorry, channels, and those
9 channels included lots of different types of
10 things, cable networks and some local stations.

11 And of those 400 -- I'm just using a
12 gross number -- only about two and a half of
13 the channels on average were distance signals.
14 So you see it is a very small portion of the
15 CSO's fundamental business.

16 And of those distance signals, there
17 were over a thousand different stations carried
18 as distance signals. And we will -- putting
19 aside WGN for the moment -- we will present you
20 evidence that shows that the phenomenon that we
21 have called in prior proceedings clustering,
22 that is, distance signals -- stations are
23 carried as distance signals within a region in
24 other DMAs that is pretty close to their home
25 market.

1 In fact, something like 94 percent of
2 the non-super stations were carried within 150
3 miles. And we're going to show you some
4 evidence that sort of illustrates that in more
5 concrete ways.

6 So you will hear from 25 -- it seems
7 like more -- witnesses in this proceeding, but
8 we believe that the ultimate job boils down to
9 your evaluation of three comprehensive
10 quantitative studies.

11 First of all, it would be a virtually
12 impossible task, we think, for you to try to
13 build relative shares from evidence presented
14 by each of the parties about the value of their
15 own programming.

16 And so we have come to the point where
17 we do provide you with these comprehensive
18 quantitative studies that we don't limit to
19 this is the value that we should -- this is the
20 share that we should have.

21 We try to make it possible for you to
22 compare and contrast these studies and use them
23 as a basis for your ultimate allocation.

24 There are three studies here from our
25 perspective. And I know Mr. Garrett showed

1 five. I want to talk about why we're focused
2 on three.

3 First is the cable operators survey.
4 And this is -- and this is from the Joint
5 Sports Claimants, the Bortz survey. We agree
6 with Mr. Garrett that the cable operators
7 survey presented by the Program Suppliers in
8 this case is not something that can be relied
9 on. And I will talk about more specifics about
10 why that's the case.

11 Second is a regression analysis. And
12 here I'm going to talk about our regression
13 analysis, partly because, as Mr. Garrett
14 suggested, their regression analysis was
15 implemented for the purpose of seeing whether
16 it would corroborate their Bortz shares.

17 We did not do it that way. We -- we
18 commenced a regression study as an independent
19 piece of evidence, though, bottom line, it does
20 corroborate the Bortz numbers.

21 And the third kind of study is what
22 I'm going to call the so-called viewing study,
23 which is what has been presented by Dr. Gray.

24 Now, I want to do a bit more of what
25 Mr. Garrett started here by looking at what

1 prior decisions have said about these three
2 competing studies or competing approaches to
3 determining relative value.

4 And I do so, again, not, as Mr.
5 Garrett suggested, not to tell you that these
6 are the precedents that you have to follow, but
7 instead to illustrate the sort of arc of
8 developing an understanding of the strengths
9 and shortcomings of these competing studies
10 over the last many years.

11 And, you know, we have represented CTV
12 for more than 35 years. We have been in all
13 but one of the same proceedings Bob has. So we
14 have been through these fights before.

15 And we have had so many
16 decisionmakers, we have had so many different
17 versions of the principal studies, we have had
18 so many really credible experts who talk about
19 them, and it is kind of -- it was kind of
20 daunting to say here we go again, you know.

21 We thought we had killed this viewing
22 study, and there are reasons why it is
23 appropriate for the Judges to consider this yet
24 again in this proceeding. I don't suggest
25 otherwise.

1 But I wanted to just go back through
2 some of the -- through the history of these
3 cases. And I have selected more than Mr.
4 Garrett did. But just to briefly look at the
5 sort of development of the treatment of the
6 studies.

7 The first case I want to look at is
8 the 1979 case. And the CRT found that the
9 report is the single most important piece of
10 evidence in this record. That was the viewing
11 study that was presented by Program Suppliers.

12 The next comment they make, however,
13 on the same page is that cable operators are
14 interested in selling subscriptions and
15 viewership is of limited relevance to cable
16 operators. Nonetheless in that proceeding,
17 they gave very heavy weight to the viewing
18 study.

19 The next case ten years later, a 1989
20 case, the Tribunal, this is all -- these are
21 Copyright Royalty Tribunal cases, used the
22 viewing study as the starting point. It
23 basically grounded the shares and then asked
24 the question why was it only a starting point
25 and not the final answer?

1 And then the Tribunal explained
2 further that the previous paragraph talks about
3 how, even in the broadcast context, viewing is
4 not a perfect measure of relative value. But
5 here they say that in the cable industry, it is
6 even a lesser predictor because cable operators
7 want to attract and retain subscribers and will
8 offer niche services often unrelated to the
9 volume of viewing to try to attract those
10 subscribers.

11 And this is obviously something that
12 you are going to be hearing from us in this
13 proceeding as well, with actually direct
14 marketplace evidence about it.

15 Next we go to the 1998/'99 case.
16 Another ten years of royalties have passed.
17 Here the CARP, this is the -- this is the
18 Librarian's decision describing what the CARP
19 said. It says essentially that on its own the
20 viewing shares don't provide an independent
21 basis. You have to have a means for
22 translating them into relative value.

23 And here is why: "The Nielsen study
24 reveals what viewers actually watched but
25 nothing about whether those programs motivated

1 them to subscribe or remain subscribed to
2 cable."

3 That's the fundamental reason why,
4 from our perspective, it is an inappropriate
5 measure from an economic perspective.

6 They then talk about how the Bortz
7 study was a robust alternative. And as so, we
8 won't get to read that, but here we go.

9 MR. GARRETT: Please, please.

10 MR. STEWART: Oh, yes, so here we go.
11 This is the first case in which CTV presented a
12 regression analysis. And I want to say that in
13 none of these cases did we do so for the
14 purpose of corroborating the Bortz shares
15 because we and all of the other parties don't
16 know in advance of filing our direct case
17 evidence of what the Bortz shares are.

18 That's like a little coal in our
19 stocking that we learn only when we see the
20 Joint Sports case. But here they talked about
21 how it was appropriate to use -- to look to the
22 regression analysis as a corroboration of the
23 Bortz shares.

24 And next we go to the 2004-'05 case,
25 which is one that Mr. Garrett mentioned. But

1 here program suppliers began to move away from
2 the viewing study that they had been asserting
3 throughout. They made an analysis that
4 essentially relied on proxy markets for
5 advertising time and used the viewing as an
6 underlying basis for that.

7 But they didn't -- but that was
8 unsuccessful. That analysis was rejected.
9 And, again, the Bortz study was -- was found to
10 be more persuasive.

11 And then they commented on the
12 regression being useful -- this is now the
13 Waldfoegel regression -- to corroborate the
14 augmented Bortz survey results.

15 And, by the way, Mr. Garrett put up a
16 chart that showed, in the 2004-'05 case, the
17 Bortz numbers and the regression numbers, and
18 they were very close with respect to the top
19 three categories, and varied with respect to
20 the lower ones.

21 That's the case in this proceeding as
22 well, as I will describe.

23 So after this, of course, the Judges
24 decided the 2000 to 2003 distribution phase
25 case, not the allocation phase case -- I'm

1 sorry, no, this is still '04-'05, talked about
2 how the confidence intervals around the
3 regression results were troubling, but the
4 regression still provided some additional
5 useful information.

6 And are we done there? Yes.

7 So now we're turning to the 2000 to
8 2003 distribution case phase, in which the
9 Judges found that viewership can be a
10 reasonable and directly measurable metric for
11 calculating relative market value in cable
12 distribution proceedings, and focused on the
13 fact that in the distribution case proceeding,
14 there was relative homogeneity among the
15 programs that were being considered for
16 allocations.

17 And, as a result, concluded that the
18 concern about niche programming or attracting
19 different kinds of subscribers would be much
20 less predominant and, therefore, it would be
21 more appropriate to use the viewing study as
22 part of the analysis there.

23 Nonetheless, there was a comment about
24 the potential shortcomings of viewership data
25 alone as forming a relative share analysis.

1 And, finally, the final case I want to
2 discuss with you is the 1998-'99 distribution
3 case phase. Is that this one? It is, indeed.

4 So, again, the Judges had a concern
5 about having to rely only on viewing, which was
6 what had been presented to them as evidence in
7 the proceeding.

8 So in this proceeding the Bortz survey
9 again is the gold standard from our perspective
10 and it is -- it has been, as Mr. Garrett
11 described, improved in response to some of the
12 concerns or criticisms of the study in the
13 2004-'05 case.

14 Similarly, CTV has, again, presented a
15 regression analysis. And I want to say, again,
16 we did so as an independent relative value
17 measure.

18 And, further, that we also took into
19 account some of the criticisms of the high
20 confidence intervals in the Waldfogel analysis
21 and the like. And so we in this year undertook
22 a very substantial change in our regression
23 study. It essentially was accounted for by two
24 different things.

25 One was that in 2010, after Stella,

1 the legislation that modified the 119 license
2 but also modified parts of the 111 license,
3 cable operators were allowed to calculate and
4 pay royalties for the first time officially
5 based on subscriber sub-groups.

6 So that as the cable industry
7 continued to consolidate and bring together
8 what had formerly been independent communities,
9 they could continue to deliver only the
10 distance signals to only the sub-groups that
11 they -- who would find those distance signals
12 most valuable, and then pay royalties not on a
13 percentage of the -- the across-the-system
14 royalties, but instead the royalties
15 attributable just to the subscriber sub-group.

16 That made a huge difference in terms
17 of the amount of data that were available for a
18 regression study because you had variations
19 across sub-groups within a system and many more
20 observations to use.

21 The second thing is that we swallowed
22 hard and bought all of the data. So this for
23 the first time was a regression study that is
24 not based on samples.

25 This regression study that we're going

1 to be presenting to you takes 365 days of
2 programming information about every station
3 that was carried as a distance signal across
4 all of the cable systems across all four years.

5 That also provided lots more data to
6 improve the precision of the regression itself.
7 And, in fact, the results are significantly
8 more precise than the Waldfogel analysis or the
9 Rosston analysis that had gone before.

10 It still clearly corroborates the
11 Bortz survey for the top three categories, and
12 the differences are in the other three
13 categories.

14 Now, Program Suppliers' cable
15 operators survey, Mr. Garrett has suggested
16 some of the reasons why it should not be relied
17 on, but we believe it cannot be relied on. And
18 the reason is because the study was designed to
19 provide specific examples to illustrate the
20 program categories being asked about.

21 For our category, no examples were
22 given, unlike all of the rest of the
23 categories.

24 Further, the examples that were given
25 to illustrate Program Suppliers' category and

1 also other sports were CTV programs, not
2 Program Suppliers' programs.

3 And I just want to say that that horse
4 race back there on Mr. Garrett's slide is a CTV
5 program that was produced by the station, aired
6 only on the station. That's one for which we
7 deserve royalties. But it was given as an
8 example to those respondents to -- and then
9 added, whatever value was attributed to that,
10 was added to the Program Suppliers' share.

11 So, finally, Program Suppliers submit
12 their what purports to be a viewing study. And
13 as our witnesses will describe, it inexplicably
14 simply omits the Nielsen data that says how
15 many minutes the household actually viewed the
16 program.

17 Instead it uses household counts and
18 multiplies each one by 15 minutes, pretending
19 that it is all viewed. It doesn't even measure
20 the actual viewing that was done.

21 Moreover, it doesn't -- it ignores
22 even that set of household shares' numbers from
23 Nielsen and replaces every single bit of actual
24 viewing measure with Dr. Gray's regression
25 projection.

1 And we will show how that -- what
2 bizarre impact that has on it, but it is not
3 even a viewing study. And it is unlike the
4 viewing studies that were presented back when
5 MPAA was presenting straight-up viewing studies
6 from Nielsen itself.

7 So, finally, let me turn to our case
8 on direct. Our first witness will be Marci
9 Burdick. And Marci is a -- Ms. Burdick is a
10 life-long broadcaster. She has spent her
11 entire career in broadcasting.

12 She is now a senior advisor to Schurz
13 Communications, which was a Pioneer Broadcast
14 Company, and has until recently, and did during
15 this period, owned radio stations, television
16 stations and a handful of small cable systems
17 as well.

18 Ms. Burdick has participated in
19 industry organizations and is viewed as an
20 expert about industry issues. And so she is
21 going to describe basically the kinds of
22 programs that the commercial television
23 stations produce, as I foreshadowed for you.

24 She is also going to give a few
25 real-world examples of the ways in which

1 stations are carried as distance signals to
2 visually represent this clustering effect.

3 And from -- and she will use that in
4 part to then talk about the value that
5 commercial television stations' programming,
6 the CTV programs in this claim, have for cable
7 operators when they retransmit the stations as
8 distance signals.

9 She will talk about that from her
10 perspective as a broadcaster, also from her
11 perspective as a cable subscriber, and also
12 from her perspective as a company executive
13 responsible for overseeing cable systems that
14 themselves carry distance signals.

15 Our next witness will be Dr. Gregory
16 Crawford. And Dr. Crawford is in particular an
17 expert in cable and multichannel and broadcast
18 markets. He has done extensive research and
19 work on those -- on these industries completely
20 independent of his appearing here as a witness.

21 And he will bring some of that
22 independent research to bear on the opinions
23 that he is going to provide. He was the -- he
24 was the Chief Economist at the Federal
25 Communications Commission when the FCC was

1 looking at policies having to do with cable
2 bundling of channels.

3 His experience is directly related to
4 what he is going to be providing you here. He
5 is going to be talking from the perspective of
6 an economist about the structural dynamics of
7 the cable industry themselves and how those
8 affect the choices, the relative economic value
9 of distance signal programming.

10 He is going to talk about, from an
11 economist's perspective, what are appropriate
12 ways to try to measure that, and viewing is not
13 one of them he will testify.

14 And then he will present the multiple
15 regression analysis. Again, we think this is
16 maybe the first ever study that's completely
17 comprehensive, at least certainly a regression
18 analysis that covers everything and doesn't --
19 isn't based on samples which have implications
20 for the reliability of the results.

21 And so his design was different from
22 what had been used by Drs. Waldfogel and
23 Rosston in prior proceedings, again, because of
24 the availability of this information, this new
25 information that wasn't available to them. And

1 that affected the structure of his actual
2 regression design and improved the precision
3 and reliability of the results.

4 Our next witness is Dr. Christopher
5 Bennett. He is an economist and econometrician
6 as well. He has substantial experience working
7 on massive databases like the ones that were
8 necessary to process here.

9 He is going to describe his work on
10 categorizing all the programs, on all the
11 stations, on every day and all four years, as
12 well as the efforts he made to combine the
13 giant databases on carriage and programming as
14 critical inputs for Dr. Crawford's regression.

15 And then he is also going to be
16 describing his analyses that led to the -- to
17 charts presenting cable industry statistics.
18 He updated this clustering study that CTV has
19 introduced into the record in every proceeding
20 for the last many, showing that 94 percent of
21 the non-super stations were carried within 150
22 miles of their home market.

23 And he is going to provide maps of the
24 locations of the distance signals, distance
25 signal carriage of the Schurz Communications

1 stations that Ms. Burdick was going to talk
2 about.

3 Our last direct witness is Jonda
4 Martin from Cable Data Corporation and her
5 testimony is going to be submitted on the
6 papers. She provided data and testimony to
7 support the studies of several of the distance
8 parties here.

9 And so our direct case evidence, we
10 believe, will provide a substantial basis for
11 an award for CTV that is higher than the prior
12 case award.

13 I want to just talk about our rebuttal
14 witnesses and then turn, finally, to describing
15 our claim.

16 In the rebuttal case we focused first
17 on the Program Suppliers' quantitative studies.
18 And so most of our rebuttal testimony is going
19 to be directed at flaws in the Gray study and
20 as well in the Program Suppliers cable operator
21 study.

22 Second, our rebuttal testimony, it is
23 interesting that four of the six parties in
24 this proceeding actually use regression
25 analyses as part of their -- either as their

1 quantitative study or in support of it as
2 Dr. Gray did.

3 And Dr. Erdem from the Settling
4 Devotional Claimants filed testimony
5 criticizing the use -- suggesting that
6 regression is not a proper mode of analysis to
7 determine relative value. So part of our
8 rebuttal is going to be rebutting that
9 assertion.

10 So the only technical thing I wanted
11 to say is that in filing our exhibits we filed
12 both our pre-January 2018 Gray third errata
13 rebuttal and our post, because we believed that
14 it would be -- which one is in the record is
15 contingent on your determination on the pending
16 motion.

17 And so you will hear from Dr. Crawford
18 again and Dr. Bennett again, although it will
19 be while they're up on their direct. And
20 Dr. Bennett also provided some analyses for our
21 final witness, who is Ceril Shagrin, to
22 illustrate the points that she made.

23 Ms. Shagrin is a renowned expert in
24 viewing and audience measurement. She worked
25 for many years for Nielsen and, in fact, had a

1 significant role in actually creating the
2 National People Meter sample that Dr. Gray's
3 study relies upon.

4 And she is going to testify about why
5 that, that database of National People Meter
6 viewing numbers, is not the right sample to use
7 and won't get you to a measure of how much
8 viewing was done to distance signal programs.
9 And she is going to talk about other flaws as
10 well.

11 She will illustrate this by looking at
12 where the distance signals are in terms of
13 markets versus where the NPM sample was created
14 to over-sample in terms of markets and other
15 issues with Dr. Gray's analysis that leads her
16 to the conclusion that his study neither
17 validly nor reliably measures distance signal
18 viewing in 2010 to '13.

19 Okay. So, finally -- are we there
20 yet -- our claim.

21 We will be requesting an award of
22 shares in the basic, basic funds, and 3.75
23 funds for each of the separate years. And that
24 will be net of the music and NPR shares. So
25 we're going to be seeking shares that would

1 total to 100 percent of the -- once we get to
2 the final numbers -- of 100 percent of the
3 basic and 3.75 fund share.

4 However, our approach to the 3.75 fund
5 claim is simply that, because PTV is not
6 eligible to receive any share of the 3.75
7 royalties, you simply take their share away and
8 recalculate the shares of the other parties to
9 add to 100 percent of the 3.75 fund.

10 And so it depends, in part, in
11 significant part, on what PTV's award is of the
12 basic royalties.

13 I wanted to just show you something
14 along the lines of what Mr. Garrett did. These
15 are, from our perspective, again, the three
16 competing comprehensive quantitative studies
17 that you are going to need to evaluate.

18 The Bortz survey and the Gray viewing
19 survey we averaged across the individual years.
20 The Crawford regression reports individual year
21 and total 2010 to '13 shares.

22 But as you will see and as Mr. Garrett
23 suggested, in 2004 to '5 we were awarded, CTV
24 was awarded roughly 16 percent, just over
25 16 percent of the royalties.

1 We believe that the record evidence
2 that's ultimately in this case will support a
3 significant increase in our share. And our
4 claim will be for at least 19.5 percent of the
5 basic fund and an appropriately-increased share
6 of the 3.75 fund.

7 We're going to do that. We're going
8 to present you the claim only after we have
9 seen all of the evidence in the record and hope
10 that we resolve some of the differences among
11 the competing studies, but we will do what we
12 can to help you along the way.

13 Any questions?

14 JUDGE BARNETT: Thank you, Mr.
15 Stewart.

16 MR. STEWART: Thank you.

17 JUDGE BARNETT: Mr. Dove, I have you
18 recorded as a 30-minute opening. Is that
19 correct?

20 MR. DOVE: That's correct, Your
21 Honor.

22 OPENING STATEMENT BY COUNSEL

23 FOR THE PUBLIC TELEVISION CLAIMANTS

24 MR. DOVE: Good morning, Your Honors.
25 My name is Ron Dove, and I represent the Public

1 Television Claimants.

2 As you heard earlier this morning,
3 this proceeding centers around relative
4 marketplace value of the different programs
5 represented by each claimant group.

6 One way to determine the relative
7 value is to look at the results of the cable
8 operators surveys, regressions, and viewing
9 studies that you have heard Mr. Garrett and Mr.
10 Stewart talk about this morning, and look at
11 those, those studies, as put forward by the
12 other parties.

13 Another way to look at relative value
14 is to adjust the benchmark awards from the last
15 proceeding based on evidence that circumstances
16 have changed.

17 Public Television's case focuses on
18 evidence using both of these approaches.

19 Since the last proceeding
20 circumstances have changed a great deal for
21 Public Television. Public Television's
22 relative value has increased significantly
23 since 2004 and 2005. As you will see from
24 every measure presented in this proceeding,
25 Public Television's share has grown, in some

1 cases more than double. Public Television is
2 the only claimant category to show growth
3 across each and every measure.

4 So why has Public Television's share
5 and its value increased so much? And the short
6 answer to that is that the best of the best got
7 better.

8 Public Television has always offered
9 the best of the best programming. And what I
10 mean by that is that instead of dedicating an
11 entire signal to a single topic like science or
12 history, Public Television is able to select a
13 unique mix of celebrated programs across a full
14 range of genres.

15 As the noted filmmaker Ken Burns
16 summed it up, "PBS manages to produce essential
17 commercial-free children's programming as well
18 as the best science and nature, arts and
19 performance, and public affairs and history
20 programming on the dial -- often in stark
21 contrast to the superficial, repetitive and
22 mind-numbing programming elsewhere."

23 In 2010 to 2013 this best of the best
24 programming got even better. During that
25 period Public Television had record -setting

1 ratings and acclaim, and it provided a package
2 of programming more differentiated than ever
3 before because the rest of the marketplace
4 increasingly blurred together.

5 You will hear or read testimony from
6 three Public Television witnesses, Michael
7 Kelley, Linda McLaughlin and David Blackburn.

8 Public Television's first witness is
9 Michael Kelley, Senior Vice President of
10 Programming and Business Affairs at PBS. Mr.
11 Kelley has a decade of experience developing
12 PBS' content strategy.

13 To streamline the proceedings, the
14 parties have consented to the admission of Mr.
15 Kelley's written testimony and exhibits into
16 the record without the need for their live
17 testimony, or his live testimony.

18 In his written testimony Mr. Kelley
19 describes why Public Television programming
20 appeals to audiences and cable operators,
21 particularly in the context of competition in
22 the cable marketplace.

23 So who are the Public Television
24 Claimants? Although PBS represents the Public
25 Television Claimants in these proceedings, PBS

1 is not the only Public Television Claimant.
2 The Public Television Claimants category is
3 defined to encompass all programs, broadcasts
4 on the more than 350 U.S. non-commercial
5 educational television stations that are
6 retransmitted by cable operators.

7 Unlike the other claimant groups, the
8 Public Television category includes all of the
9 programs on each non-commercial signal being
10 retransmitted. By contrast, the other
11 categories are defined to include only certain
12 types of programming on any given network or
13 independent signal.

14 There are hundreds of Public
15 Television Claimants. They come in all shapes
16 and sizes from all over the country. Public
17 Television Claimants include the PBS member
18 stations such as WGBH in Boston, WNET in New
19 York, KCTS in Seattle and WETA here in
20 Washington. Each station has the autonomy to
21 produce its own content with a unique
22 perspective, a unique schedule, and a unique
23 identity.

24 The Public Television Claimants also
25 include other producers of Public Television

1 programming, such as Sesame Workshop, the
2 Metropolitan Opera and This Old House.

3 I want to take just a minute to say a
4 few words about PBS and its role here.

5 The vast majority of Public Television
6 stations are members of PBS. PBS does not
7 produce content itself. PBS helps its member
8 stations and independent producers to produce
9 the content.

10 PBS also helps to gather and
11 distribute content nationally through its
12 national program service, and also, you know,
13 for other -- for its members and other stations
14 to supplement their own programming.

15 This structure means that although
16 most member stations do carry signature PBS
17 programming, each Public Television station is
18 unique.

19 PBS also provides administrative
20 support to its member stations, which is why
21 I'm here, you know, serving as a representative
22 in these proceedings.

23 So with that background in mind, let's
24 turn back to the issues raised by the first
25 graph that I showed you.

1 Why did cable operators choose to
2 carry more Public Television, more distant
3 Public Television signals in 2010 to 2013? Why
4 did audiences viewing of distant Public
5 Television increase? And why do all the
6 parties' measures of relative value show a
7 substantial increase in the value of Public
8 Television in 2010 to 2013?

9 Well, the natural place to start, I
10 think, is with the nature of Public Television
11 programming itself. As Michael Kelley
12 describes in his testimony, in 2010 to 2013
13 Public Television continued to feature the most
14 acclaimed children's programming, the arts,
15 history, historical drama, science, medicine
16 and technology, and news and public affairs
17 programming.

18 During this time period, PBS focused
19 on providing even better programming in these
20 core areas, including new ground-breaking shows
21 like Downton Abbey. Downton was tremendously
22 successful during this time period, and in 2013
23 became the highest rated PBS drama of all time.

24 And as you will see from this short
25 clip of highlights from 2012, that's just

1 scratching the surface.

2 (Video clip played.)

3 MR. DOVE: If you want to watch more
4 of that video, it is in our Exhibit 3000.

5 (Laughter.)

6 MR. DOVE: Your Honors, the programs
7 you just saw and others like them had some of
8 the highest ratings and most awards in Public
9 Television history.

10 In 2011, for example, PBS won more
11 Peabody Awards than any other organization.

12 In 2012, PBS won more Emmy Awards than
13 any other broadcast or cable outlet. Downton
14 Abbey alone won ten Emmy Awards in just the
15 three years spanning 2011 to 2013.

16 But that's not the only reason why
17 Public Television became relatively more
18 valuable. The cable landscape around Public
19 Television shifted during this time period,
20 allowing Public Television to offer a more
21 differentiated package of programming than ever
22 before.

23 It is important to look at what was
24 happening with Public Television's competition
25 in assessing relative marketplace value. So

1 what did happen elsewhere?

2 As you will read in Mr. Kelley's
3 testimony, channels that may once have competed
4 for Public Television audiences were moving in
5 a different direction entirely in 2010 to 2013.
6 Channels that purported to focus on genres like
7 arts and entertainment, history, or learning,
8 blurred the lines as they began offering more
9 and more reality television instead.

10 For example, the Arts & Entertainment
11 Channel served up Dog the Bounty Hunter. The
12 History Channel gave us not history but Ice
13 Road Truckers. The Learning Channel offered
14 Toddlers & Tiaras, and Bravo gave us Princesses
15 of Long Island. And there are many other
16 similar examples.

17 While such shows can be entertaining
18 and inexpensive to produce, a viewer in 2010 to
19 2013 could satisfy his or her desire for
20 personality-driven shows on virtually any
21 channel on the dial. So there was little
22 differentiation in the rest of the marketplace.

23 By contrast, Public Television offered
24 distinguishing features that were just not
25 matched by other channels. PBS earned the

1 hearts and loyalty of parents and teachers
2 across the country as the undisputed leader in
3 children's programming.

4 And beyond offering beloved characters
5 like Big Bird and Cat in the Hat, Public
6 Television provided the educational and skills
7 training that parents and teachers rely on.

8 Mr. Kelley's testimony highlights that
9 PBS's children's programming was more than just
10 entertaining stories. These programs were
11 produced in close collaboration with
12 educational consultants and child development
13 specialists to help children develop their
14 math, reading, and social skills.

15 And why does that matter for these
16 proceedings? Well, excellent children's
17 programming is a must-have for parents and a
18 must-have for cable operators who want their
19 parents' business. And PBS is hands-down the
20 best at this programming.

21 Public Television also filled the void
22 for in-depth educational and
23 culturally-enriching programming for viewers of
24 all ages. With a limited supply of such shows
25 on commercial television, cable operators

1 turned to Public Television to deliver this
2 valuable programming to their subscribers.

3 Another reason Public Television was
4 so valuable was that it offered the kind of
5 trustworthy programming that you couldn't find
6 anywhere else. Public Television continued to
7 earn the unrivaled trust of audiences as a
8 source of safe, fair, and balanced programming.

9 And in the chart on the slide here,
10 you know, public polls from the period show
11 that PBS was more trusted than the courts, than
12 commercial television, and cable television and
13 even, if you can believe it, down there at the
14 bottom, Congress, more trusted than Congress.

15 So, you know, that was one aspect to
16 it.

17 Public Television's relative value
18 increased dramatically in 2010 to '13 in part
19 due to its leading role in deploying
20 multi-casting technology. By June 2009 the
21 television broadcast industry had switched from
22 analog broadcast to digital.

23 Using the same amount of spectrum as
24 one analog channel, television stations could
25 now broadcast two, three, or more simultaneous

1 digital channels of content, and viewers could
2 flip to these multi-cast channel just like any
3 other channel.

4 Public Television was a multi-casting
5 pioneer. By the end of 2010, Public Television
6 stations provided about one-third of all
7 multi-cast signals in the country. It was a
8 natural fit.

9 For example, here on the slide, WGBH
10 in Boston broadcast not only its primary stream
11 but also a multi-cast channel called World that
12 focused on world news, documentaries, science,
13 and nature programming; a dedicated children's
14 programming multi-cast channel called WGBH
15 Kids, and a multi-cast channel called Create,
16 which featured cooking, home improvement,
17 gardening, arts and crafts, and travel
18 programming.

19 And many cable operators chose to
20 distantly carry Public Television multi-cast
21 channels to their subscribers. And Section 111
22 of the Copyright Act makes clear that
23 programming on such channels is compensable.

24 These changes in the marketplace are
25 reflected in Public Television's tremendous

1 increase in relative value according to every
2 quantitative measure submitted in this
3 proceeding. Cable operators carry more Public
4 Television to more distant subscribers.

5 As you will hear from our witness,
6 Linda McLaughlin, Public Television's relative
7 share of carriage increased by 32 percent from
8 the last proceeding.

9 Distant viewing of Public Television
10 increased by even more, by 37 percent, based on
11 the data and analyses of Program Suppliers'
12 experts Mr. Lindstrom and Dr. Gray.

13 Both cable operator surveys show that
14 the relative value of Public Television
15 increased dramatically. The Bortz survey
16 showed a 31 percent increase and the Horowitz
17 survey showed a 109 percent increase over the
18 benchmark results from 2004 and '05.

19 Finally, the econometric valuations of
20 Public Television programming increased most of
21 all. The Joint Sports Claimants' expert,
22 Dr. Israel, estimated a market value for
23 distant Public Television that is roughly
24 double the regression estimates from 2004 and
25 '05.

1 And the Commercial Television
2 Claimants expert, Dr. Crawford, valued Public
3 Television at 176 percent more valuable. So we
4 will go through each of these measures in more
5 detail in a moment, but first let's talk about
6 Public Television's experts.

7 The experts who will testify about
8 these changes are economists Linda McLaughlin
9 and David Blackburn. Ms. McLaughlin has more
10 than 40 years of experience analyzing the media
11 industry, including copyright licensing
12 royalties, rates, and fees.

13 In the 2004 and '5 proceeding,
14 Ms. McLaughlin testified regarding the
15 appropriate adjustment to the Bortz survey that
16 would account for the fact that the Bortz
17 survey discards entirely from its sample all
18 cable systems that carried only Public
19 Television or Canadian distance signals.

20 And so the Judges in the last
21 proceeding used Ms. McLaughlin's testimony as
22 their starting point for allocation for
23 increasing Public Television's share.

24 Dr. Blackburn received his Doctorate
25 in economics from Harvard. His research has

1 focused on the valuation of intellectual
2 property, including copyrights and film,
3 television, and music. As this Panel may
4 recall, Dr. Blackburn has testified before the
5 Judges previously, including in the Web IV and
6 SDARS proceedings.

7 Rather than call both witnesses to
8 give duplicative testimony, we intend to call
9 just Ms. McLaughlin to testify about their
10 joint report. But, of course, if the Judges
11 want to hear from both witnesses, from
12 Dr. Blackburn as well, we're prepared to make
13 him available.

14 So let's talk about the numbers.
15 Ms. McLaughlin will testify that Public
16 Television's carriage increased by nearly
17 one-third from 2004-'05 to 2010 to '13, based
18 on the metric of distant subscriber instances.

19 A distant subscriber instance is one
20 distant signal received by one cable
21 subscriber. So, for example, if a cable system
22 has ten subscribers and carries two distant
23 signals to all of its subscribers, then there
24 would be 20 distant subscriber instances in
25 that example.

1 In 2004-05, Public Television
2 accounted for 12.1 percent of the total distant
3 subscriber instances. In 2010 to 2013, Public
4 Television rose to 15.9 percent of distant
5 subscriber instances, a 32 percent increase.

6 That increase represents real world
7 choices made by cable operators based on their
8 valuations of the various channels of
9 programming available to them. They are
10 choosing Public Television signals over the
11 other options that are out there.

12 JUDGE STRICKLER: Counsel, may I ask
13 you a question?

14 MR. DOVE: Sure.

15 JUDGE STRICKLER: Why is the
16 difference between the previous determination
17 and the data you have in 2010 to 2013
18 significant as opposed to just focusing on the
19 data from 2010 to 2013 being the significant
20 number?

21 MR. DOVE: We're going to do that as
22 well, Your Honor, but we think that the Panel
23 in 2004-'05 came up with a benchmark and we're
24 trying to use that as a benchmark to, you know,
25 to look at all the measures to show the

1 increase in all those measures as evidence of
2 changed circumstances.

3 JUDGE STRICKLER: I understand that.
4 You say if it was the other way around, if 2004
5 to 2005 was 30 percent for Public Television
6 shares --

7 MR. DOVE: Right.

8 JUDGE STRICKLER: -- and now it is
9 down to 15.9 percent, if we were to adopt your
10 witness' analysis, we would still end up at
11 15.9, using the 15.9 percent, right?

12 MR. DOVE: I -- well, Public
13 Television is not proposing that 15.9 percent
14 should be a measure of -- of relative value.

15 JUDGE STRICKLER: No, I understand
16 that. I meant this input would still be the
17 same input whether it represented an increase
18 or a decrease?

19 MR. DOVE: I think that's fair, and
20 that has been argued in the -- you know, when,
21 you know, some -- it could be changed
22 circumstances in a negative way as well.

23 JUDGE STRICKLER: So you are just
24 trying to give us the historical perspective as
25 opposed to saying that this gives greater

1 weight to the number. The number is whatever
2 your experts say and this is one of several
3 inputs you are now going to go through and tell
4 us what the inputs are. But past is not
5 prologue. It is just past.

6 MR. DOVE: Right. I mean, this is --
7 these are -- these are -- these are different
8 inputs. And our experts, Ms. McLaughlin and
9 Dr. Blackburn, took these inputs and were able
10 to create a range of where relative value
11 should be for Public Television based on these
12 different increases, and applying that
13 percentage increase to the benchmark value from
14 2004-'05 that was determined by the Judges.

15 We then also looked to the actual
16 relative value measures of the different
17 studies in this proceeding. And we will see
18 that the -- that it all corroborates each other
19 is what we're trying to do with this.

20 I think it may became apparent as I
21 proceed here.

22 All right. So let's -- let's turn
23 then to the viewing measure here. Public
24 Television's share of distant viewing has
25 increased by even more than its carriage.

1 In the last proceeding and in this
2 one, the Program Suppliers group has presented
3 evidence of distant viewing.

4 In 2004-'05, according to the Program
5 Suppliers' witness Paul Lindstrom, Public
6 Television programming accounted for
7 19.8 percent of distant viewing, and in 2010 to
8 '13, according to Program Suppliers' witness
9 Dr. Jeffrey Gray, Public Television accounted
10 for 27.1 percent of distant viewing, an
11 increase of 37 percent.

12 And let me just stop there, I guess,
13 to get to Judge Strickler's question, you know,
14 what we're trying to show here is if you look
15 at the measure of carriage and it increased
16 32 percent, if you then lay over top of that
17 the fact that viewing increased by more than
18 that, it would suggest, and our experts will
19 testify, that -- that there is greater avidity,
20 that the percentage of increase in viewing was
21 greater than just the mere increase in
22 carriage, suggesting that every -- that there
23 is more to bear there, that there was more
24 value in that -- in that increase.

25 So, you know, when we see that,

1 turning to the next slide, cable operator
2 surveys, you know, they also show a substantial
3 increase in the relative value of Public
4 Television programming.

5 But before I -- I want to come back to
6 this slide for a minute and want to say one
7 thing about the Bortz survey that is important
8 to understand for Public Television.

9 The Bortz survey omits cable systems
10 that choose to carry only Public Television
11 distant signals. These are the most valuable
12 cable operators from our -- from our
13 perspective. They are the ones that only
14 choose Public Television.

15 Those are totally omitted from the
16 Bortz survey, even though those systems by
17 definition value Public Television more than
18 any other signal.

19 When the Bortz survey generated its
20 stratified sample, several cable operators in
21 the sample had chosen only Public Television.
22 And to use Mr. Trautman's word, he discarded
23 those systems from the sample. He also did
24 that for the Canadians, by the way, but they
25 can discuss that. And as Mr. Trautman admits,

1 his survey must be adjusted to account for this
2 omission.

3 In the 2004-'05 proceeding,
4 Ms. McLaughlin calculated what each party's
5 Bortz shares would have been if Mr. Trautman
6 had not discarded these systems.

7 She assumed that those discarded
8 systems would have a similar response rate.
9 And she assumed that those discarded systems
10 would have followed Mr. Trautman's own
11 instructions by stating the relative value of
12 all of the distantly-retransmitted programming
13 on their systems.

14 And so systems that carried only
15 Public Television, if they followed the
16 instructions, would have assigned a value of
17 100 percent to the Public Television category.
18 And accepting this reasoning, the Judges in
19 2004-'05 adopted Ms. McLaughlin's augmented
20 Bortz survey shares as their starting point.

21 And so back to the slide. In
22 2004-'05, Public Television's augmented Bortz
23 survey share was 6.2 percent. In 2010 to '13,
24 Public Television's augmented Bortz share is
25 8 percent. And that's a 31 percent increase.

1 And as Ms. McLaughlin will testify,
2 there is reason to think that the 2010 to '13
3 augmented Bortz survey still understates Public
4 Television's value because of participation
5 bias.

6 And she will -- and Ms. McLaughlin
7 will explain that the cable operators who
8 completed the Bortz survey carried
9 significantly less Public Television
10 programming than the universe of all cable
11 systems, even after augmenting the Bortz survey
12 to include the deleted systems.

13 I know that's a mouthful, but the
14 point is that there is still participation bias
15 in the Bortz survey.

16 And that may explain why the other
17 cable operator survey, the Horowitz survey,
18 shows a much larger increase in the value of
19 Public Television.

20 The cable operators in the Horowitz
21 survey valued Public Television at
22 12.9 percent. The Horowitz survey wasn't
23 conducted in 2004 and '05, so we can't directly
24 compare it to the last proceeding, but it is a
25 constant sum cable operator survey and, like

1 the augmented Bortz survey, the Horowitz survey
2 accounts for -- it does account for systems
3 that carry only Public Television distance
4 signals.

5 So if you compare the Horowitz survey
6 in this proceeding to the augmented Bortz
7 survey in the last proceeding, Public
8 Television share has roughly doubled.

9 And that doubling, that result from
10 Horowitz is consistent with the regression
11 analysis by the Sports Claimants expert,
12 Dr. Israel, who estimated Public Television's
13 share at 13.5 percent.

14 And that is roughly double the
15 6.8 percent estimated for Public Television in
16 2004-'05 in the regression put forward by the
17 Commercial Television Claimants' witness,
18 Dr. Waldfogel.

19 And in this proceeding, the Commercial
20 Television Claimants' expert, Dr. Crawford, has
21 estimated Public Television's value at
22 18.8 percent, which is 176 percent more than
23 the 2004-'05 estimate.

24 So a lot of numbers there. But if you
25 put it all together, in terms of changed

1 circumstances, every study except one in this
2 proceeding estimates that Public Television's
3 relative value has increased by more than its
4 carriage.

5 Public Television's relative distant
6 carriage has increased dramatically by almost
7 one-third. But its distant viewing intensity
8 has increased by even more.

9 And the cable operators choices, as
10 reflected in the Israel and in the Crawford
11 regressions, show that Public Television's
12 value has increased by much more than even
13 that.

14 Now, one of the cable operator
15 surveys, the Horowitz survey, is consistent
16 with these other studies. It estimates the
17 cable operators -- that cable operators valued
18 distant Public Television programming
19 approximately twice as much in 2010 to '13
20 compared with '04/'05.

21 So the only study, the only one to
22 estimate that Public Television's relative
23 value actually, you know, did not increase by
24 more than its carriage percentage is the Bortz
25 survey, which shows it at about the same, but

1 as our witness will testify, the Bortz survey
2 is biased against Public Television.

3 So before I conclude, I do want to set
4 aside this question of changed circumstances
5 for a moment and focus on the valuation of
6 Public Television just in 2010 to '13 according
7 to the testimony submitted by the other
8 parties, as Judge Strickler mentioned.

9 And I want to focus just on the basic
10 fund, not the 3.75 or Syndex funds which Public
11 Television did not participate in.

12 So just like the Judges did in the
13 last proceeding, it is a simple calculation to
14 compute Public Television's share of the basic
15 fund given that it receives zero from the other
16 two funds.

17 So let's start with the augmented
18 Bortz survey. After augmenting the Bortz
19 survey, using the same methodology adopted by
20 the Judges in the last proceeding, Public
21 Television's share of the basic fund would be
22 9.3 percent averaged over the four years at
23 issue.

24 Again, that's by far the lowest
25 estimate for Public Television of any party's

1 methodology.

2 According to the Horowitz survey, by
3 contrast Public Television's share of the basic
4 fund should be 14.9 percent. And that result
5 is similar to the Joint Sports Claimants'
6 regression presented by Dr. Israel, which
7 calculated Public Television's share of the
8 basic fund at 15.6 percent.

9 Dr. Crawford's regression for the
10 Commercial Television Claimants calculates a
11 higher share for Public Television at
12 19.7 percent of the basic fund.

13 And then finally, based on Dr. Gray's
14 viewing study for Program Suppliers, the Public
15 Television Claimants should be awarded
16 31.4 percent basic fund as averaged over the
17 four years.

18 And these measures are consistent with
19 the evidence of a very substantial increase in
20 relative value for Public Television since the
21 last proceeding.

22 Ms. McLaughlin and Dr. Blackburn
23 concluded that, based on changed circumstances,
24 the evidence supports an award for Public
25 Television in the range of 9.9 to 20.8 percent.

1 That was their changed circumstances
2 methodology, of the basic fund.

3 But we can narrow that range even
4 further by looking at the Horowitz survey and
5 the two regression analyses. These three
6 shares submitted by the three largest parties
7 in this case corroborate not only the evidence
8 of positive changed circumstances for Public
9 Television, but they also corroborate each
10 other.

11 And so based on all this evidence,
12 Public Television is seeking an average award
13 of between 14.9 and 19.7 percent of the basic
14 fund for the years 2010 to 2013.

15 Thank you.

16 JUDGE BARNETT: Thank you, Mr. Dove.

17 Your timing was right on point. We
18 will be at recess for an hour. We will
19 reconvene at 1:30, and I believe, Mr.
20 Cosentino, did I say that right?

21 MR. COSENTINO: Cosentino.

22 JUDGE BARNETT: Cosentino. Say it for
23 me?

24 MR. COSENTINO: Cosentino.

25 JUDGE BARNETT: Thank you. You will

1 be up for 30 minutes starting at 1:30.

2 (Whereupon, at 12:29 p.m., a lunch
3 recess was taken.)

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1 AFTERNOON SESSION

2 (1:34 p.m.)

3 JUDGE BARNETT: Please be seated.

4 Mr. Cosentino?

5 MR. COSENTINO: Thank you, Your Honor.

6 OPENING STATEMENT BY COUNSEL

7 FOR THE CANADIAN CLAIMANTS GROUP

8 MR. COSENTINO: Your Honor, for the
9 record, I am Victor Cosentino appearing on
10 behalf of Canadian Claimants Group. Kendall
11 Satterfield, my co-counsel, is operating the
12 hot seat for me. So he's not at our table.

13 The Canadians Claimants Group is a
14 collection of non-U.S. television movie
15 producers and public and private broadcasters
16 in Canada with programs shown on Canadian
17 signals that were retransmitted by U.S. cable
18 systems.

19 It's a mix of smaller and larger
20 companies. CBC Radio Canada, the national
21 network in Canada, is our largest member, and
22 it spearheads the group.

23 The CCG's claim then is for all
24 non-U.S. programming on Canadian broadcast
25 stations that were distantly retransmitted in

1 the U.S. in 2010 to 2013. One of the things
2 that makes the Canadian claimants' claim a
3 little different is that while we are a mix of
4 programming types such as news programs and
5 entertainment programs and children's
6 programming, local public affairs, we're also
7 -- and it's all mixed together on a signal,
8 there's also a carveout for U.S. programming on
9 those signals. So U.S. programming that
10 belongs to the Devotional Claimants or Program
11 Suppliers or Joint Sports is carved out from
12 our claim.

13 So we are -- unlike PBS, we are not
14 claiming for an entire signal, and unlike some
15 of the other categories, we are not kind of a
16 uniform category of a single programming type.

17 And one thing to understand about
18 Canadian signals is that they are only
19 available in a limited portion of the United
20 States. Under Section 111, they are only
21 allowed to be retransmitted in the northern
22 portion of the United States. So large major
23 markets like Washington, D.C. don't have cable
24 systems with Canadian distance signals on them.
25 The -- Danielle Boudreau, one of our witnesses,

1 will actually present more of this information
2 during her testimony and -- which gives me the
3 opportunity to raise our witnesses.

4 We have a total of eight witnesses.
5 Five of them will appear live and three are
6 going to appear on paper. Danielle Boudreau is
7 a senior specialist for business and rights at
8 the CBC. Beverly Kirshenblatt is an executive
9 director for corporate and regulatory affairs
10 at CBC. They will both be appearing live.

11 Jonda Martin, whose name you've heard
12 before, is president of Cable Data Corporation
13 Her testimony will be by written submission
14 only.

15 And Austin Wong, who is the director
16 of legal and business affairs at DHX Media,
17 which is a large producer of children's
18 programming in Canada, will also appear just on
19 paper.

20 We also have four expert witnesses;
21 Dr. Frederick Conrad, he is a professor at
22 Michigan University -- I'm sorry, at the
23 University of Michigan, and he will be
24 addressing the surveys that are in this case.

25 Dr. Lisa George is a professor of

1 economics at Hunter College at the City
2 University of New York. She will be
3 addressing -- providing our regression analysis
4 and addressing other regression analyses and
5 commenting on the criticisms of regression
6 analysis.

7 Dr. Debra Ringold, she is dean and
8 professor at the Atkinson Graduate School at
9 Willamette. She will be appearing only on
10 paper and will be presenting testimony on our
11 cable system operator surveys.

12 And, finally, Dr. Matt Shum is a
13 professor of economics at Cal Tech. And he
14 will be addressing Dr. Gray's study.

15 JUDGE BARNETT: No one from McGill or
16 University of Toronto or --

17 MR. COSENTINO: No, I'm sorry.

18 JUDGE BARNETT: Okay.

19 MR. COSENTINO: But -- but
20 Ms. Boudreau and Ms. Kirshenblatt will be
21 coming down from Canada, so -- so we believe
22 that these witnesses will provide good evidence
23 of relative market value.

24 We agree with the presentations
25 earlier this morning that this allocation

1 standard is the right standard for this case.

2 Using this standard, our case is based
3 on a regression analysis and supporting
4 evidence. So our case -- the core of our case
5 is a quantitative estimate of the relative
6 marketplace value presented by Dr. George, and
7 it's a regression analysis similar in style to
8 the regression analysis of Dr. Crawford and
9 Dr. Israel and, before them, Dr. Waldfogel, the
10 type of regression analysis that looks to
11 reveal the preferences of cable system
12 operators through their actual decision-making.

13 Supporting evidence for us is going to
14 be evidence about our programming on our
15 signals, the distinctly Canadian identity of
16 our content. Canadian signals, Canadian
17 signals are mandated by the Canadian government
18 to have a certain percentage of content that is
19 originated in Canada, and in some cases, such
20 as CBC signals, that exceeds 90 percent of the
21 content.

22 We also have a cable operator survey
23 that shows that cable operators are carrying
24 Canadian signals primarily for their Canadian
25 content and not for U.S. content. We also

1 believe that there is evidence that shows that
2 the amount of CCG content on Canadian signals
3 has increased since the prior period and that
4 the amount of Canadian compensable time has
5 increased relative to the other parties in this
6 case, since the prior period.

7 Finally, we believe that the results
8 of the Crawford, Israel, and Gray studies
9 support our claim in this case.

10 As you've heard, regression analysis
11 uses actual market data. We believe that
12 that's important. Cable system operators
13 retransmit signals as programming, to attract
14 and retain subscribers. So they're making
15 decisions about retransmission based on that.
16 And we believe that extracting that through
17 regression tells us something about how they
18 value the signals.

19 The Stella, as you've heard this
20 morning, provided -- provides a change in 2010
21 that allowed us to get a much richer amount of
22 information from cable systems because now they
23 are legally allowed to fine-tune their
24 retransmissions so that they can pick specific
25 signals and put them in specific communities

1 and know how much they were paying for them.

2 That dramatically increased the volume
3 of information available for these regressions,
4 but it also allowed cable system operators to
5 be more deliberate in their process, so not
6 only is there more data, but the quality of the
7 data and what it reveals is better.

8 We believe that regressions will in
9 this case let economists use this market data
10 to help us determine relative marketplace value
11 better than any other system.

12 Now, Dr. George's regression, as I
13 mentioned, is a Waldfogel-type regression. It
14 uses primarily programming content data from
15 the Canadian Radio Television and
16 Telecommunications Commission. This is an
17 organization that -- that gathers information
18 on what is retransmitted in Canada -- I'm
19 sorry, not retransmitted; what is broadcast in
20 Canada.

21 So stations file logs on a monthly
22 basis about every minute of programming in
23 their day, what the show was, what type of show
24 it was, where it originated. And that data is
25 what Dr. George is using in her regression.

1 She's also using royalty and signal carriage
2 data from statements of account and demographic
3 data from the U.S. Census.

4 Now, Dr. George's regression differs
5 from Dr. Crawford's and Dr. Israel's regression
6 in that it estimates relative marketplace value
7 of Canadian content only and it models for the
8 legal framework that limits Canadian signal
9 carriage to the northern portion of the United
10 States.

11 Regressions are based on this type of
12 revealed preference. Carriage or lack of
13 carriage shows that the cable system operator
14 did or did not want the signal. But in an
15 environment where they're not allowed to carry
16 the signal, that might not be the case.

17 So by taking that into account, she is
18 able to factor out the situation where cable
19 system operators can't carry Canadian signals
20 and avoid confusing it with situations where
21 they choose not to carry Canadian signals.

22 Now, Dr. George's regression results
23 for the CCG shares range from 6.55 to
24 7.85 percent of all royalties from 2010 to
25 2013. We believe that this is a significant

1 increase over our prior awards, and we intend
2 to support it with evidence that shows both the
3 quality of our programming, corroboration from
4 other reports and studies, and increases from
5 20 -- I'm sorry, from 2005 -- 2004 and 2005.

6 So Beverly Kirshenblatt and Danielle
7 Boudreau will show that most CCG programming is
8 distinctly different from U.S. claimant
9 programming. You heard earlier today about
10 niche programming and its important to cable
11 system operators.

12 Well, CCG programming is niche
13 programming. It's not available anywhere else
14 in the United States except through these
15 channels.

16 Austin Wong, whose testimony is
17 submitted in writing only, will establish that
18 Canadian producers make programming that is
19 sought out throughout the United States and the
20 world, meaning this is not second-rate
21 programming. That is first-tier programming.

22 Now, one of the things we talked about
23 with regression was this decision-making by
24 cable system operators to select channels. One
25 example we have in our testimony that's

1 particularly interesting is that we have
2 French-language channels. These are not
3 dubbed. These are original programming
4 channels created by an entirely different
5 French network.

6 And in this map, that's in
7 Ms. Boudreau's testimony, it shows
8 French-ancestry Americans by state. And you
9 can see that, as you'd expect, Louisiana has a
10 very high concentration, but also New England.
11 So cable system operators would predictably
12 want to choose French-language signals for
13 retransmission into those states. And Danielle
14 Boudreau will show that, in fact, they do that.

15 CFTM, CHLT, and CIMT are
16 French-language signals by the network TVA, and
17 they are retransmitted into New England. CBC
18 also has French-language signals, CBFT, CKSH,
19 and CBAFT, that are retransmitted into this
20 region.

21 The full -- her full testimony will
22 show that Canadian signals, other
23 French-Canadian signals are not retransmitted
24 elsewhere in the United States, but they are
25 concentrated in this region.

1 Now, more broadly, our cable system
2 operator survey shows that cable systems carry
3 Canadian signals predominantly for their CCG
4 content. Drs. Ford and Ringold conducted 20
5 surveys over the roughly -- I think it's 18
6 surveys in the years 1996 to 2013 and showed
7 that -- you know, their results showed cable
8 system operators retransmit the Canadian
9 signals primarily for their unique Canadian
10 programming.

11 Now, the Ford/Ringold survey helps
12 explain why CSOs carry signals and supports the
13 outcome of Dr. George's regression, but it is
14 different than the other cable system operators
15 you'll -- cable system operator surveys you'll
16 hear about.

17 Our constant sum survey is a
18 population study rather than a sample because
19 the number of systems carrying Canadian signals
20 is very small, so we're able to reach them or
21 attempt to reach all of them.

22 Our constant sum question asks only
23 about the value of one signal at a time. So
24 you say you carry CBUT, and we ask them just to
25 value that; whereas Sports and Horowitz say you

1 carry CBUT and WGN and CKSH, whatever signals
2 they list, and ask them to aggregate and
3 combine that information in their constant sum.

4 Finally, our results are intended to
5 explain carriage and not directly produce
6 royalty shares.

7 Now, another form of supporting
8 evidence for our claims is to look at the
9 increases in CCG content on Canadian signals
10 since 2004/2005. And here we've taken the top
11 six retransmitted Canadian signals, and you can
12 see that in 2004 and 2005, they had roughly
13 78 percent Canadian content on average, and
14 starting in 2010, that went up to the point
15 where they were at almost 86 percent on average
16 in 2013.

17 Now, we can also -- this is a simple
18 average. We can also look at this by weighting
19 the information by subscriber incidences. And
20 you heard an earlier description of what
21 subscriber incidences are. It is basically a
22 measure of how widely distributed a signal is.

23 You would expect that weighting this
24 way, which would increase the -- would reflect
25 an increase in average content, forces signals

1 that were more widely retransmitted, and that's
2 what we have here. If you look at the four
3 columns on the left under CCG, that is the
4 straight average of all Canadian signals that
5 were retransmitted, roughly 71 percent,
6 72 percent Canadian content on average. But
7 when you weight them, you see that that number
8 goes out to 80, 85 percent, showing that cable
9 system operators distributed signals with more
10 Canadian content to more of their subscribers.

11 Similarly, Program Suppliers' content
12 as a weighted percentage goes down, showing
13 that they were on less frequently distributed
14 Canadian signals. JSC goes up slightly and SDC
15 goes down pretty -- pretty low.

16 We can see that there's a trend here
17 also with regard to the Canadian signals, that
18 over this relative period of 2010 to 2013,
19 there is an upward trend in the -- in these
20 results as getting higher as we go to 2013.

21 So if we jump back to Dr. George's
22 regression for a moment, we can see that her
23 results reflect that same trend as well, going
24 up over time, reflecting more value through
25 this period.

1 Another way to measure change since
2 the prior period is by looking at the change in
3 compensable minutes. You saw this table
4 earlier today during Mr. Garrett's opening. It
5 is from Dr. Israel's rebuttal. And it shows
6 that Canadian -- CCG compensable minutes
7 increased 47 percent over the last proceeding.
8 That is, we have increased the total amount of
9 compensable time we -- that was retransmitted
10 and the other parties have decreased during
11 that time.

12 There are other market data estimates
13 of CCG value, as Dr. Gregory Crawford's
14 Waldfoegel-type regression for CTV that you
15 heard about, there's Dr. Israel's
16 Waldfoegel-type regression for JSC, and there's
17 Dr. Gray's viewing study.

18 We think probably the best overall
19 market data analysis provided by the other
20 parties was done by Dr. Crawford.
21 Dr. Crawford's results show CCG's shares
22 ranging from 4.1 to 4.65, also generally
23 increasing over this period of time.

24 Dr. George adjusted Dr. Crawford's
25 regression analysis to deal with the fact that

1 he didn't take into account this limit on where
2 our signals could be retransmitted, and her
3 results are a little higher when that bias is
4 removed, from 4.6 to 5.1, again, going up over
5 that period of time.

6 Now, Dr. Gray did an adjustment to
7 Dr. Crawford's regression analysis and he
8 provided one point estimate for the whole
9 period, and it's 5.46. And his adjustment was
10 based on the concept of removing systems that
11 paid the minimum fee or less. And we'll get
12 into that more, but he believed that this might
13 be a fair way to look at this.

14 Now, Dr. Israel also provided a
15 regression analysis, and Dr. Gray adjusted that
16 in a similar way and came up with 4.5 -- 4.15
17 over this period of time. Notably,
18 Dr. Israel's regression did not analyze data
19 from 2013, and as you've seen in prior slides,
20 that's the year when our shares are the
21 highest. So we believe that this 4.15 number
22 is not a fair average over the four-year
23 period.

24 Dr. George attempted to address --
25 adjust Dr. Israel's regression analysis to take

1 into account two things. One, there was a
2 misclassification of our content. That is,
3 Dr. Israel credited it to other claimants.
4 And, two, this issue of the legal limitations
5 on the carriage of Canadian signals.

6 And she came up with 6.97 over those
7 three years. Now, those are the two
8 regressions, Waldfogel-type regressions.
9 There's also Dr. Gray's viewing study.

10 And we believe this is problematic.
11 Our expert, Dr. Shum, will testify to some of
12 the flaws that you heard earlier, this weak
13 relationship between viewing and CSO
14 valuations, the faulty data and methodology,
15 and an arbitrary selection among alternative
16 models that he made in his most recent
17 approach.

18 And we believe the study has
19 particular biases against the CCG content.
20 Dr. Shum attempts to overcome them to the best
21 he can and comes up with royalty shares ranging
22 from 3.38 to 5.77, that he believes serves as a
23 floor.

24 Now, in addition to these quantitative
25 analyses, JSC and Program Suppliers have

1 offered two CSO surveys that attempt to provide
2 relative marketplace value. We don't believe
3 that these are valid for CCG.

4 The JSC Bortz survey is a variation on
5 the prior Bortz survey. The Program
6 Supplier/Horowitz survey is an attempt to
7 improve upon the 2004-2005 version of Bortz.

8 I think you heard earlier today that
9 Mr. Stewart said that the parties don't know
10 ahead of time what the results are going to be
11 for these -- the Bortz survey. I can tell you
12 we do. And it's almost always zero.

13 (Laughter.)

14 JUDGE BARNETT: You don't think you
15 are clairvoyant.

16 MR. COSENTINO: Well, let's just say
17 we agree that it's reliable.

18 So the Bortz/Horowitz survey has --
19 both of them have these questions that are very
20 similar. All programming broadcast by Canadian
21 stations, they're not just asking about CCG
22 content. They're asking about everything
23 that's on the signal. That's the CCG content,
24 the Program Supplier content, the SDC content,
25 and the JSC content. And they're getting

1 responses that basically say it's worthless,
2 all of it.

3 We think that's inaccurate. In fact,
4 we're not alone in this. The prior tribunals
5 in this matter, the CRB in the last proceeding
6 said the Bortz results understate our value in
7 the '98/'99. The CARP said it was not designed
8 to include us. And in 1990-'92 when Bortz
9 himself testified, he suggested that small
10 numbers are incapable of being accurately
11 measured.

12 While the Bortz survey may be accurate
13 for the larger parties, it is certainly not
14 accurate for us.

15 Our witness, Dr. Conrad, will address
16 this in more detail. He's going to testify
17 that the two surveys cannot be used to value
18 CCG programming because they use these
19 unnatural categories in their constant sum
20 question of comparing content on a signal, all
21 content on a signal, with types of content,
22 that method for combining the constant sum
23 results creates an artificial cap on our value,
24 and that the sample of respondents carrying
25 Canadian signals is simply far too small.

1 While the Bortz has a long history and
2 constant sum surveys have a long history in
3 these proceedings, we believe they arose at a
4 time when the ability to gather and analyze
5 market data was not what it is today.
6 Dr. Crawford's analysis involves tremendous
7 comprehensive data for every day for four
8 years.

9 The other regression analyses involved
10 similar massive amounts of data. We believe
11 that these are the best forms of evidence and,
12 you know, we're using this data, we believe
13 that they show that the CCG is entitled to far
14 more than the shares that appear -- the near
15 zero shares that appear in Bortz and Horowitz.

16 So whether you're looking at
17 Dr. Gray's adjustment to Dr. Israel or
18 Dr. George's adjustment to Dr. Israel's
19 regression, or Dr. Crawford's regression or
20 Dr. George's adjustment to Dr. Crawford's
21 regression or Dr. Gray's adjustment to
22 Dr. Crawford's regression, or even Dr. Gray's
23 most recent viewing study as corrected by
24 Dr. Shum, you can see that there is
25 significantly more than zero value.

1 I mean, these range from 3 to
2 7 percent. Of course, we prefer the work of
3 our expert, Dr. Lisa George, and we believe
4 that these results support our claim, which is
5 at the high end of this range and based on
6 Dr. George's study.

7 So this is our claim. We make no
8 claim to the Syndex Fund. And as other people
9 have mentioned, these are net of music and NPR.

10 So in closing, cable systems that are
11 allowed to carry Canadian distance signals
12 value that programming. That's why they carry
13 it. They retransmit it into areas where --
14 into communities where there are subscribers
15 who will appreciate it, as illustrated by the
16 French retransmissions.

17 The cable system operators surveys
18 that we have done support this conclusion. We
19 believe that our regression study is well done
20 and supports these awards. And we believe that
21 the qualitative -- sorry, the quantitative
22 analyses done by the other parties also support
23 our award, an award that is significantly
24 higher than awards we have received in the
25 past.

1 Thank you.

2 JUDGE BARNETT: Thank you, counsel.

3 Mr. Lutzker.

4 OPENING STATEMENT BY COUNSEL

5 FOR THE DEVOTIONAL CLAIMANTS

6 MR. LUTZKER: Good afternoon, Your
7 Honors. I'm Arnie Lutzker and I represent the
8 Settling Devotional Claimants on behalf of the
9 Devotional Claimants. And like my good friend
10 and colleague, Mr. Stewart, I just want to do
11 just a name clarification.

12 For many years, our group was known as
13 the Devotional Claimants. We have then entered
14 into a period of extended Phase II, now known
15 as distribution proceedings, in which there
16 were competitions for the Devotional Claimant
17 category. And for purposes of clarification,
18 the -- the groups that we have represented
19 identify themselves as Settling Devotional
20 Claimants.

21 And so that phrase sort of appends to
22 myself and my colleague, Mr. MacLean, but for
23 our purposes in this proceeding, we do identify
24 ourselves as Devotional Claimants but we will
25 answer to SDC and Settling Devotional

1 Claimants.

2 JUDGE BARNETT: Call you anything but
3 late for dinner, right?

4 (Laughter.)

5 MR. LUTZKER: And I just want to sort
6 of do two sort of preliminary things. I sort
7 of had prepared remarks but when I arrived,
8 Mr. Garrett sort of came over and reminded me
9 that we've been in these proceedings now --
10 we're going on almost four decades. I mean,
11 literally since the beginning of the compulsory
12 license.

13 I think Mr. Garrett claims about eight
14 weeks lead time on my activity, but we are --
15 we are both -- we've both been here a very long
16 time and dealing with -- in the world of
17 communications and copyright law, relatively
18 abstruse concepts.

19 When the compulsory license was
20 created in the '70s, it was designed to get
21 cable moving and to bring customers and
22 subscribers to the system.

23 And the independent signals that are
24 really the focal point of our activities were
25 really the -- the -- the dessert, the tweaks

1 that got people to subscribe to cable.
2 Obviously, in the decades since, the world has
3 changed dramatically.

4 And with that, as I was thinking of
5 both Mr. Garrett, and I'd add Mr. Stewart who
6 is a relatively long time member of this
7 esteemed bar, where we're at now -- and I'll
8 also add another appendage, as you know in the
9 distribution process, we are dealing with
10 royalty claims going back to 1999.

11 This is a -- almost 20 years of
12 royalties in dispute, even though we're only
13 acting now on royalties only less than a decade
14 in dispute, but it's still a dramatic sort of
15 logjam with associated distributions of these
16 funds.

17 And so from our perspective as a small
18 claimant who has spent extraordinary resources
19 to play in this game because we have to play in
20 the game -- and, again, Mr. MacLean, who is my
21 math colleague anyways, was tallying up sort of
22 conceptually the permitted value of this entire
23 room. And if you do that -- I mean, his
24 estimate was something like 250 dollars a
25 minute as a function of hourly rates, but I

1 think that's probably an underestimation.

2 This is a very expensive proceeding
3 fighting over funds that have been in situ for
4 a very long time. And so from our perspective,
5 we seek what I call the three C's. We seek
6 confidence, consistency, and certainty in the
7 resolution of these cases.

8 Now, I'll harken back to my
9 conversation, or it wasn't part of the
10 conversation with Mr. Garrett, but the position
11 of the Devotional Claimants throughout these
12 decades of proceedings has been: Let's have
13 one primary formula that we can rely on that's
14 rational, consistent, and gives a certainty to
15 the parties that we don't have to expend at
16 least 250 dollars a minute for the next 100
17 hours and beyond.

18 Throughout the entire process these
19 last 40 years, the Devotional Claimants, once
20 they were created as a separate, independent
21 claimant category, have supported in one form
22 or another the Bortz survey.

23 And we do that in this proceeding as
24 well. And as I'll indicate, we did it sight
25 unseen. And that fits our definitions of

1 confidence, consistency, and certainty. And
2 I'll go into more detail about that in a couple
3 of minutes.

4 To -- to briefly introduce our case,
5 we have three primary witnesses. One of them
6 who we're going to be submitting on the papers,
7 and two others who will appear personally.

8 I take Judge Barnett's -- I'll call it
9 order to heart that we should deliver photos of
10 these individuals, but they have all appeared
11 before you and you will be familiar with all of
12 them.

13 Our witness on the papers will be
14 Dr. William Brown, who is an expert in
15 communications and, as it turns out, a
16 professor at Regent University teaching the
17 very courses to economic graduate students of
18 the methodologies that are under discussion
19 here. And in his testimony, he -- he analyzes
20 those in particular terms.

21 Dr. Brown is also an expert in
22 religious programming writ large. He has spent
23 decades doing research and analysis of
24 religious programming, and he offers his
25 perspective, and he has testified in various

1 Phase II proceedings regarding that. And he
2 also testified in the 2004 to '5 -- what was
3 called phase 1, but allocation proceeding, on
4 the value of religious programming.

5 And I'll add one other aside. At
6 lunch, another colleague, Mike Warley, reminded
7 me that today is Ash Wednesday. It's not just
8 Valentine's Day; it's Ash Wednesday. And you
9 can see many people in the library have already
10 been to church. Ah, okay.

11 What that underscores is -- and
12 Dr. Brown sort of has been very articulate
13 about this -- the importance of religion in our
14 society. And, you know, as we talk about
15 clearly when we deal with allocation of
16 royalties, we view the Devotional Claimants as
17 a small claimant in these proceedings.

18 We are not -- we aspire but we're not
19 going to achieve the results of the Sports
20 Claimants or Program Suppliers or even the
21 local television, but at the same time religion
22 is such at the heart of the American life, and
23 when the proceedings initially began in the
24 1970s and early '80s, because religious
25 programming, which does not function in the

1 general world of communications with
2 advertising and commercials and making money
3 that way -- it buys the time to present the
4 messages -- it was treated as an outcast, and
5 it was given literally a zero share. It
6 appealed, and the court of appeals said you've
7 got to give them something. We came back, and
8 over the years, we had a share that was
9 relatively very modest, in the three-tenths of
10 a percent to 1 percent range, a little more
11 than that.

12 And for many years, we accepted that
13 principle because of, again, the three C's,
14 consistency, confidence, and certainty. We
15 knew what we were going to -- we knew the
16 process, and at that point in time the
17 standard, as Mr. Stewart described in his -- in
18 his comments, the standard was the Nielsen
19 viewing base.

20 And the nature of the viewing, as it
21 turned out in those studies, whether they were
22 done to the best degree, they were done as well
23 as they could do, the viewing studies gave
24 religion a very small share. And that's what
25 we accepted for a period of time.

1 As the Bortz survey became the more
2 dominant and important survey in this process,
3 we stood up and said: We rely on it and we'll
4 take our share sight unseen. And we have done
5 that consistently throughout this process.

6 And in terms of -- as Mr. Garrett
7 indicated, among all the parties, we're
8 probably the ones that don't have a formal
9 methodology because we accept the Bortz
10 methodology. We think it has value. We think,
11 obviously, there may be some minor tweaks that
12 you want to make to it, but it gives certainty,
13 confidence, and consistency to the extent that
14 this is a survey that can be relied upon.

15 Now, appearing as witnesses, live
16 witnesses, whose photographs we will provide,
17 will be two individuals. John Sanders, who,
18 again, has appeared in Phase II proceedings, is
19 an expert in media valuation. He has worked on
20 thousands of media activities and sales, and
21 his expertise is how do you value something?
22 How do you take sort of the uncertainty of what
23 you've got and turn it into a dollar amount
24 that you can summarize and present to a client
25 so they can make wise business decisions?

1 He will hopefully give you his wise
2 counsel on that. And he will be not only
3 addressing the allocation of shares, he'll also
4 give his professional critiques of third-party
5 methodologies, and he'll also summarize the
6 devotional group and their share requests.

7 Dr. Erkan Erdem, who is an expert in
8 econometrics, statistics, and data analysis,
9 will also be a principal witness for us, and he
10 is going to evaluate the methodologies of the
11 third parties and the data that they propounded
12 in these cases, and he will offer his critiques
13 regarding those and also provide his sense of
14 the benchmarks that are most reliable for you
15 to make the allocation of shares.

16 In the course of these proceedings,
17 the SDC or Devotional Claimants will have three
18 principal points. First, we will support the
19 Judges' applying the results of the Bortz
20 survey of the cable system operators in
21 allocating shares.

22 Second, we will discuss the WGN
23 situation. The issue of non-compensability
24 content on WGN as it relates to the devotional
25 category but perhaps to others, we believe is

1 now fully baked into the Bortz survey. It gets
2 that analysis and it does not require
3 additional adjustments by you in your final
4 determinations.

5 Third, we will address the regression
6 formulas which have been discussed in detail in
7 these initial presentations. And our bottom
8 line position is, as Dr. Erdem will elaborate,
9 they do not measure value. Rather, they are
10 biased and not trustworthy at its core.

11 When the first regression analysis was
12 presented by Gregory Rosston in the proceeding
13 in the '90s, the CARP at that point had serious
14 concerns about it. Even Dr. Waldfogel's
15 regression formula was not accepted as a -- on
16 point blank.

17 So in our view, there is no regression
18 formula that should be used to reduce the
19 Devotional Claimants' Bortz shares.

20 Now let me turn to a little more
21 elaborate explanation of these points; first to
22 the Bortz survey. As I've indicated, the
23 devotionals have participated in every Phase I
24 proceeding since the inception. And they have
25 supported the reliance on the Bortz where the

1 cable operators, the parties that are buying
2 the programming, are asked the right question:
3 How do you value that programming that is in
4 contest in these proceedings and provide a
5 numerical valuation for that?

6 In our view, the Bortz survey is the
7 most reliable, tested, and valuable evidence in
8 this proceeding, bar none. Based on past
9 rulings of the -- of the CRT, the CARP, the
10 CRB, we have advised, as we advised in our
11 written statements, that we will accept these
12 Bortz results. And we did it initially filing
13 our written direct statement without even
14 knowing what our share is.

15 As Mr. Cosentino said, he had a good
16 hint as to what his share might be, but, you
17 know, we did not know. And, in fact, the Bortz
18 share that comes as a result of the revised
19 survey for this proceeding is a significant
20 drop from what the Bortz share provided in the
21 2004 to '5 proceeding.

22 At that point, our share was in the
23 7 percent range, and based upon the
24 non-compensability question dealing with WGN,
25 our share was cut more than in half. And that

1 was done based, in part, on some speculation
2 but, in part, on sort of the intuition and
3 presentations that were made.

4 But in this proceeding, we have
5 stronger evidence. The devotional share has
6 been dropped but not by as much as the Judges
7 in the 2004 proceeding, 2005 proceeding
8 determined.

9 It is now in the 4 and a half range,
10 not in the 3 and a half range. For the
11 devotionals that's a meaningful difference.
12 And we are prepared to accept that.

13 And as I said, for our goal -- our
14 goal in this proceeding is not to be back for
15 the 2014 to 2017 proceeding. Our goal is to
16 have a result that provides confidence,
17 certainty, and consistency in the application
18 of standards that will enable the parties to
19 resolve these cases on their own in due course.

20 Quite interestingly, with the filing
21 of the direct cases, we learned, as the other
22 parties did, that for the first time Program
23 Suppliers, long advocates of awarding the
24 allocation phase by relying on the Nielsen
25 ratings, have their own survey of cable

1 operators called Horowitz survey.

2 There are some differences and some
3 critiques of each of these surveys that the
4 parties will make, but what is interesting from
5 the devotionals' perspective is that both the
6 Horowitz survey and the Bortz survey result in
7 an almost identical result. It's a tenth of a
8 point difference.

9 We'll take a tenth of a point more or
10 less, but, in other words, these surveys of the
11 cable operators, who are the right people to
12 ask the right -- the questions, came up with
13 virtually the same result for the Devotional
14 Claimants. And Mr. Sanders will summarize
15 his -- his views on that.

16 Now, I'm intrigued by what Mr.
17 Cosentino said that the Canadians' percentage
18 gives credence to the devotional claim. For
19 the first time in this proceeding, the
20 Devotional Claimants have isolated -- based on
21 the discovery data we received from the
22 Canadians, we've isolated Devotional Claimant
23 programming that is carried on Canadian
24 signals, retransmitted into the U.S., that the
25 Bortz survey did not identify as devotional.

1 In other words, there is a piece -- it
2 is not necessarily a huge piece, but, you know,
3 sometimes one program a week can be more
4 valuable than 20 programs in the same week for
5 particular people, for particular cable
6 operators.

7 So we know and the -- and I would say
8 that the Canadians have conceded that there is
9 Canadian stations retransmitting Devotional
10 Claimant category content and that properly
11 belongs to our category.

12 And the task will be to isolate it, to
13 identify it, and to add a premium which we
14 would say to the Bortz share, that would be the
15 one -- the one principal tweak we would make to
16 the Bortz allocation.

17 Now, there are two other points that I
18 want to make. I want to focus on the -- the
19 elephant in the room, WGN, and focus also on
20 the question for Devotional Claimants about
21 non-compensable content.

22 In the 2004 to '5 proceeding, as I
23 indicated, it was identified that there were
24 many devotional programs that were substituted
25 by Tribune at the head end when it circulated

1 WGN nationally, and many of the programs that
2 were inserted were devotional programs.

3 Now, one line of argument is, well,
4 this requires a material drop in the devotional
5 share. And that's what was, in fact, done in
6 the 2004 to '5 proceeding. The devotional
7 share, Bortz gave it 7.2. We ended up with
8 3.4, more than a 50 percent drop, because there
9 were substituted programs on that -- on that
10 nationally distributed signal.

11 And there's a logic to that. I can
12 appreciate that. And now, as I said, the Bortz
13 survey, when it addresses the issue of
14 non-compensability, it gives specific titles to
15 the cable operators. These are the devotional
16 shows. Give us the value. They come up with
17 the value.

18 And on just the WGN only, so this is
19 the only group they actually surveyed, the
20 WGN-only signals, they come up with a 3.9,
21 instead of a 4.5 or whatever. In other words,
22 there's a -- there's a modest decline when --
23 when the specific cable operators are asked if
24 it's just WGN and these are the devotional
25 shows, come up with your share. According to

1 the Bortz data, it is 3.9.

2 Now, Mr. Trautman is going to testify
3 that he didn't do this study with systems that
4 have WGN and other signals because of the
5 confusion that he indicated would obtain. And
6 I believe one of the colleagues has sort of
7 described that potential confusion.

8 Taking that -- taking that as it is,
9 we asked Dr. Erdem to take a look at all the
10 data that the Bortz survey had that was
11 produced in discovery and try to determine if
12 there was a bias between the systems that carry
13 WGN-only and the systems that carry WGN and
14 other signals where they didn't ask the -- this
15 is the specific religious programs, how do you
16 rate devotional content?

17 And what he concluded was, in the vast
18 majority of cases, there's no showing of bias,
19 the numbers are -- statistically, there is no
20 significant difference, and, as a result, he
21 will testify that the Bortz survey is good as
22 it stands, we should use it and it should --
23 the -- the Devotional Claimants should not be
24 downgraded because Bortz was unable to test
25 program-specific questions to cable operators

1 who carry WGN and other signals.

2 Now, let me add one other thing that
3 Mr. Sanders views as a significant issue in the
4 valuation of devotional programming in general
5 on WGN.

6 We know that a substantial amount of
7 WGN programming substitutes religion. What
8 does it substitute the religious programming
9 for? In the main, it deletes the WGN newscasts
10 that are early morning, mid-morning telecasts
11 and plugs in -- non-compensable, but plugs in
12 religious programming.

13 To John Sanders, this is a significant
14 fact because, for the first time, we talk about
15 the Bortz survey being the seller -- the Bortz
16 survey being the buyer in this hypothetical
17 marketplace. We know what the buyer -- how the
18 buyer values it. We don't know how the seller
19 values what's going on.

20 What John Sanders, who is a media
21 valuation expert, is saying, well, Tribune --
22 and Tribune has got to be -- since WGN is so
23 widely carried, it has got to be the most
24 significant commercial television signal in the
25 whole shebang. In the commercial television

1 category, it has got to be the most important
2 of those signals.

3 And what it is saying is when we go
4 national, we're going to take out our own
5 newscasts for which we could be compensated by
6 the Judges in this proceeding. We're going to
7 take that out and we're going to put in
8 religion.

9 And why? According to Mr. Sanders,
10 because they -- when it goes national, they
11 value this religious programming more than they
12 value some of their own newscasts. It's not
13 that they don't have newscasts. They have
14 plenty of newscasts, but they value the
15 religious programming in making that
16 substitution.

17 This is the only evidence in this
18 proceeding from the seller's side -- I may be
19 wrong about this and people will jump up and
20 tell me -- but from our perspective, this is
21 critical, significant, meaningful evidence that
22 the seller of content is willing to pull out
23 its own programming, lose royalties from the
24 Copyright Royalty Board, and work the
25 marketplace by putting in devotional content.

1 It says something. And John Sanders
2 will further explain that.

3 In terms of the -- the other thing
4 that's quite interesting about WGN this in this
5 proceeding is, as has been indicated by
6 Mr. Garrett and as the record shows, if you do
7 a, what, fee generation location based on the
8 number of subscribers and the money that is
9 attributed to WGN, WGN is the dominant signal
10 in this proceeding. By far.

11 And we may have questions as to who
12 has produced this fee generation theory or
13 allocation of shares, how do you allocate the
14 amount of money that cable systems pay to a
15 single signal?

16 And from our perspective, this fee
17 generation notion and the importance of WGN in
18 context relying just on a presumed allocation
19 of royalties to WGN based upon a fee generation
20 theory is misleading. I'll say it in that
21 context.

22 Why is it misleading? Well, just look
23 at your records from 2016. 2016, WGN goes off
24 the air as a distance signal and is now a
25 cable-only retransmitted signal.

1 Look at the amount of royalties that
2 have been collected. Does it go down
3 75 percent? No. Does it go down 50 percent?
4 No. It goes down a fraction.

5 There is still going to be parties
6 that are willing to participate in these
7 proceedings in the future if we don't have that
8 certainty, confidence, and consistency.
9 They'll be willing to participate for the
10 amount of money, because there is 160 and more
11 million at stake in years when WGN is off the
12 air.

13 Why is that? It's because under the
14 compulsory licensing system, there is a minimum
15 fee that every system must pay. And under a
16 fee generation system that tries to attribute
17 that minimum fee to WGN, if WGN wasn't a
18 signal, they would still have to pay the
19 minimum fee.

20 And, as a result, the WGN -- the
21 credit that is being presumed for WGN gets
22 exploded. And we want to put it back in
23 context. What's the minimum fee that a system
24 would pay otherwise? And based on that, I
25 think you can put the WGN bubble in context and

1 put it in context of where the royalty system
2 is today in 2017 and the money coming in. And
3 in the cable universe, it is not as extreme as
4 has been presented.

5 There's also testimony -- and we will
6 have to test the testimony because there are
7 people that may conflict, but Mr. Sanders in
8 his testimony points to the fact that Tribune,
9 which is a multi-station owner, an owner of
10 many important television -- local television
11 stations that local cable systems want to
12 carry -- in Washington, it's WDWC, in New York
13 it's WPIX, KTLA, other important signals around
14 the country, and Tribune, because it has these
15 important signals, has, according to testimony,
16 used its leverage to say you want to carry WPIX
17 in the New York market? Then you've got to
18 carry WGN. You want to carry a local signal in
19 the D.C. market? You've got to carry WGN.

20 Why is that significant for you? What
21 it means is that there is an element of
22 compulsion in the carriage of WGN which is
23 unsettling in the marketplace. And I dare say
24 there's not a single regression study that
25 takes the issue of compulsion of carriage of

1 WGN into context. And we will test the -- the
2 regression analysis, and I will have a few more
3 things to say about them, but the notion of
4 compulsion that Mr. Sanders sees as an
5 valuation expert is an additional unique fact
6 in this proceeding that diminishes the
7 non-compensability concern that we think you
8 need to have about WGN. And, particularly, as
9 it relates to the devotional category.

10 Finally, I want to talk a little bit,
11 just talk a little bit, about these regression
12 formulas because in some ways your mind can
13 explode with all the complexities that they
14 throw into place.

15 Each of the regression approaches that
16 are offered by Dr. Israel, Dr. Crawford, and
17 Dr. George -- and they're all doctors, we
18 appreciate that -- they seek to measure
19 correlations between minutes and the amount of
20 royalties. And they throw in lots of other
21 factors, but these are royalties paid under the
22 compulsory licensing system.

23 Quite simply, as Dr. Erdem will
24 explain, these correlations are not measures of
25 value but, rather, functions of the fee

1 structure of the compulsory licensing system.
2 And that's critical. They don't measure value.
3 They come up with shares, and they purport to
4 have an implication of value, but they are not
5 measuring value. They are really measuring the
6 regulated -- they're sort of reviews of the
7 regulated marketplace.

8 In the case of Dr. Gray, who has got
9 lots of issues that will be addressed in this
10 proceeding, his is really a function of viewing
11 hours, not value. He is trying to determine
12 the number of hours and relate it to value, but
13 the viewing hours is not related to value.

14 We all know whether you would want --
15 would you rather watch, you know, an
16 infomercial about, you know, hairstylists or
17 the Superbowl? The infomercials may run for 20
18 hours, and the Superbowl may run for two or
19 maybe three. It's longer these days.

20 JUDGE BARNETT: 12.

21 MR. LUTZKER: But the point is the
22 measure of the number of hours is not
23 correlated to the value -- to value.

24 I want to also add and focus your
25 attention to Dr. Erdem's conclusion on page 18

1 in his -- in his testimony, in his rebuttal
2 testimony, where he urges, respectfully, that
3 the Judges should be alert to the fact that the
4 regression analysis can be very sensitive to
5 included variables, as well as to a small set
6 of influential observations.

7 And I'll do an aside. Included
8 variables also has the issue of excluded
9 variables. What's included? What's excluded?
10 And when we did the analysis of these
11 regression analyses, you can -- you can see how
12 they all favor the party that's putting it
13 together.

14 And, you know, why is that? Well, we
15 know why it is. Because they are very smart.
16 They have a goal. And your task is to sort of
17 filter through the superfluous and sort of
18 understand that they are all using data in a
19 way to advance their particular claims.

20 And we don't begrudge them that
21 because, you know, we're probably the only one
22 that sort of said we'll take Bortz sight
23 unseen. But they are advancing their claim,
24 and they include and exclude various data and
25 variables, which can have a dramatic impact.

1 And you plug in a new variable and you
2 get a whole different set of results. And who
3 is to say what's right or wrong? But the
4 bottom line is these regressions are -- are
5 traps for the unwary if you don't come into it
6 appreciating that there is not a single
7 regression analysis that can provide you with
8 the end result that you are seeking.

9 The one thing I would suggest -- and
10 this came out of the 2004 to '5 proceeding to
11 some degree -- there may be some value in them
12 in dealing with the ordinal -- the order,
13 priorities, of particularly the bigger
14 claimants in this proceeding to say that sports
15 is at the top, Program Suppliers next,
16 Commercial Television. That has some value,
17 you may be able to tease that out of these, but
18 beyond that, I think you are -- you're dealing
19 with a potential for reliance on data that is
20 biased, unreliable, subject to impressions
21 created by experts who are playing with various
22 data and not giving you the other data that you
23 would otherwise need.

24 And as a bottom line, Mr. Sanders will
25 present our claims, which mirror the Bortz

1 shares of 4 percent in 2010, 5 and a half in
2 2011, 4.8 -- sorry, 4 and a half in 2011, 4.8
3 in 2012, and 5.1. There's some premium we're
4 asking for because of the Canadian results.
5 And we're happy to live with that. We don't
6 think the Bortz shares need to be readjusted
7 downward in terms of any bias, because we don't
8 think there's any bias remaining in the Bortz
9 system.

10 I would add just one final request,
11 and it sort of harkens back to Mr. MacLean's
12 opening remarks as we were beginning this
13 morning. The errata that has been introduced
14 in this proceeding is throwing everybody into a
15 jumble.

16 You've gotten amended rebuttal
17 statements upon amended rebuttal statements.
18 We don't know quite precisely which one is
19 which. The record -- and this almost came out
20 of -- Ms. Whittle was asking, you know, what
21 documents can be admitted? So many parties
22 have now sort of needed to respond to these and
23 the record will be pretty messy if this issue
24 is not resolved very quickly.

25 Ideally, you know, from our point of

1 view, we're hoping maybe you are near it, but
2 it needs to be resolved in a way that gives
3 consistency, confidence, and certainty to the
4 decisions that you reach.

5 We've explained in our motion why we
6 think it should be excluded. And, you know,
7 I'll make one last plea in that regard. Thank
8 you.

9 JUDGE BARNETT: Thank you,
10 Mr. Lutzker.

11 We're going to take -- sorry. We're
12 going to take our afternoon recess. It will be
13 15 minutes. And then, Mr. Olaniran, you can
14 take it home.

15 I will, though, take this opportunity
16 to ask, as Ms. Whittle has indicated, I know
17 that the parties have marked a lot of exhibits
18 and agreed to their admissibility.
19 Admissibility is not the same thing as
20 admission. So if there are -- if there are
21 exhibits that you want us to deem admitted as
22 opposed to admissible, if you could give us
23 that list. Then we can go ahead and process
24 those, and Ms. Whittle can do her magic on
25 ECRB.

1 I know, for instance, that there's
2 some questions as Mr. MacLean mentioned this
3 morning about 6018 and 6019. I -- we
4 understand that issue is still hovering, but
5 there surely are some you can -- that you think
6 are admitted or could be admitted on
7 stipulation. And we will treat them as such,
8 as opposed to having them just marked
9 inadmissible.

10 If there are some that you've agreed
11 are admissible but you're not going to offer,
12 then don't tell us that they are admitted
13 because we don't want stuff in the record that
14 you're not going to offer and that you don't
15 want in the record. Just things that you're
16 certain you want in the record and that you
17 have agreed can be admitted without further
18 discussion, if there are any. Okay? So we
19 will be at recess for 15 minutes.

20 (A recess was taken at 2:37á.p.m.,
21 after which the trial resumed at 2:55 p.m.)

22 JUDGE BARNETT: Please be seated. Mr.
23 Olaniran?

24 MR. MacLEAN: Wait.

25 JUDGE BARNETT: I'm sorry. Mr.

1 MacLean?

2 MR. MacLEAN: Your Honor, over the
3 break, if you would like it now, we have
4 reached an agreement with regard to
5 admissibility of exhibits.

6 JUDGE BARNETT: Oh, thank you. Why
7 don't we just take that list first thing in the
8 morning. Ms. Whittle can take care of it at
9 that point.

10 MR. MacLEAN: Absolutely. Thank you.

11 JUDGE BARNETT: Thank you. Now, Mr.
12 Olaniran.

13 MR. OLANIRAN: Good afternoon, Your
14 Honors. I wanted to take a few seconds to
15 address the errata drama that's been going on.

16 And I know Ms. Plovnick said a few
17 words earlier. I just wanted to make sure to
18 get some -- to make at least our record in a
19 much more collaborative context, just to put
20 everything in context, because I know you will
21 be making a ruling, hopefully very soon.

22 There are really three issues that
23 have sort of been woven into two, all three
24 relating to the errata. The first issue is
25 whether or not the submission of the errata

1 itself was so deliberately late as to prejudice
2 the parties in this case.

3 The second is the substance of the
4 errata. And the third is the discovery that
5 relates to the errata.

6 On the first question, whether the
7 submission was so deliberately late as to
8 prejudice the parties, we don't believe that's
9 the case.

10 We follow basically the process that
11 most of the parties in this proceeding follow
12 with respect to when we receive testimony. We
13 received rebuttal testimony right about, I
14 think, September 15.

15 And the process usually is when you
16 have either experts that you used on written
17 direct and perhaps you anticipate rebuttal
18 experts, you share the testimony with them to
19 get their views.

20 And then they get back to you and you
21 have discussions back and forth about
22 litigation strategy and so on and so forth.

23 That's exactly what we did in this
24 case. In terms of -- and certainly when we
25 received all of the testimony, the particular

1 testimony, it may come as a surprise to you,
2 but pretty much every single testimony, with
3 the exception of a couple, will attack Program
4 Suppliers testimony.

5 So you can imagine we have probably
6 most of the witnesses in this case and we're a
7 popular target. I wonder why? So, of course,
8 when we receive this testimony, we send it out
9 to -- we send them out to our experts and they
10 get back to us about what their thoughts are.

11 And so it was in the course of doing
12 this that the question about, about data on WGN
13 was raised. And, of course, because we're
14 always been at that, we prioritize some of the
15 things that we think are important and we focus
16 on them. But that notwithstanding, we, in due
17 course, we came to the issue of this data and
18 we contacted our expert.

19 We tried to get a team together and
20 tried to get a conference call with Nielsen,
21 which we did, sometime after Thanksgiving. It
22 was that process that yielded the new data.

23 And the new data, I think, arrived
24 sometime the first week of December.

25 JUDGE BARNETT: Mr. Olaniran, I'm

1 sorry to interrupt, but we didn't ask for
2 argument. Mr. MacLean didn't give us legal
3 argument on his position. We have it in
4 writing.

5 MR. OLANIRAN: Okay.

6 JUDGE BARNETT: We will deal with it.
7 I think it is unfair to give you this, this
8 forum.

9 MR. OLANIRAN: Your Honor, I actually
10 thought it was unfair. I thought -- I felt
11 like Mr. MacLean was making an argument this
12 morning, which is why I was surprised.

13 JUDGE BARNETT: We didn't take it as
14 such. We have it on papers and we will deal
15 with it accordingly.

16 MR. OLANIRAN: Fair enough. Thank
17 you, Your Honor.

18 JUDGE BARNETT: Thank you. And we
19 have you listed as a one hour; is that right?

20 MR. OLANIRAN: That's correct.

21 JUDGE BARNETT: Okay. We're going to
22 finish early. I thought we were going to run
23 over today.

24 OPENING STATEMENT BY COUNSEL
25 FOR THE PROGRAM SUPPLIERS

1 MR. OLANIRAN: And on that pleasant
2 note, I have to tell you I really enjoyed the
3 trip down memory lane from Mr. Lutzker and Mr.
4 Garrett on how the music was better and people
5 dressed nicer and how the CRT ruled in their
6 favor all the time and so on and so forth, how
7 that was the year that Ms. Plovnick was born.

8 MS. PLOVNICK: Yes, it was.

9 (Laughter.)

10 MR. OLANIRAN: So that was really very
11 enjoyable, but it is now 2010 through 2013. My
12 task here today is to tell you who we are, what
13 our claims are, how we view the key elements of
14 this case that we're going to ask you to pay
15 attention to as the parties deliver their --
16 present their evidence, and then tell you what
17 we think we're entitled to in this case.

18 In terms of who we are, Program
19 Suppliers consist of the member companies of
20 the Motion Picture Association of America and
21 other producers and distributors of syndicated
22 content who are not necessarily members of the
23 Motion Picture Association.

24 Your Honor, the record will show that
25 the program category is by all objective

1 measures the most diverse of all of the
2 competing program categories in this
3 proceeding.

4 One cannot reduce our programming down
5 to the generic label of movies, series, and
6 television specials. We cover more programming
7 genres than any other programming category in
8 this proceeding.

9 Although for administrative
10 convenience and by agreement of the parties,
11 the claimants in this proceeding are organized
12 in different program categories, Program
13 Suppliers programming contains nearly, if not
14 all, of the genres represented by the other
15 claimants in this proceeding.

16 Our more than 100 Copyright Owners and
17 their representatives claim television sitcoms,
18 drama, news magazine shows, entertainment
19 magazine shows, talk shows, children shows,
20 sports shows, movies, educational shows, and
21 business shows. The majority of the programs
22 on distant television stations belong to our
23 claimants.

24 Your Honors, your task, with
25 allocating royalties paid by cable system

1 operators for 2010 through 2013 pursuant to
2 Section 111 of the Copyright Act.

3 Section 111, accords the CSOs the
4 privilege of exploiting Copyright Owners, not
5 network programs, that are embedded in the
6 distant broadcast signals carried by these
7 CSOs.

8 So the parties don't have any dispute
9 as to the standard for making that allocation.
10 All the parties agree that the standard is
11 throughout the marketplace filing.

12 The parties also agree that such a
13 marketplace should be one in which the
14 contemplated transactions, which is the buying
15 and selling of distance signals, occur absent
16 the compulsion license.

17 The relative market value standard has
18 also been framed in terms of the relative
19 ability of each program to attract and retain
20 subscribers.

21 The question before you is which
22 allocation methodology most directly reflects
23 that relative marketplace value standards. And
24 I have to emphasize that the phrase -- I have
25 to emphasize the phrase "most directly"

1 because, as you have already heard in the
2 various opening statements, the parties, the
3 parties will offer a few different approaches
4 to the valuation of these programs.

5 The critical question, however, is
6 what does -- what do those methodologies look
7 like in a hypothetical marketplace? How does
8 the market function? What would the -- what
9 does the current market look like and what
10 would the market look like when these
11 methodologies are used to value programming in
12 the market? How would their market operate?

13 And I say that, so as you think about
14 all of these various approaches and how you are
15 going to weight them, we think it is important
16 to assess whether the proposed approach is
17 merely a theoretical and abstract concept as
18 opposed to a practical and applicable --
19 applicable concept to the hypothetical
20 marketplace.

21 Program Suppliers intend to show that
22 our evidence is the most objective and we think
23 the one that most directly captures the
24 relative marketplace standards.

25 Program Suppliers' evidence will show

1 that we are entitled to the largest royalty
2 award overall, and specifically for each year,
3 except for the 2012 royalty year, which I think
4 PBS has the single largest relative share based
5 on our methodology.

6 Let me offer at least three principal
7 reasons why we're entitled to the share that
8 we're asking. The first reason is our viewing
9 evidence supports such an award.

10 Program Suppliers have the largest
11 share of viewing of programs available on
12 distance signals for each year at issue, again,
13 except for the year 2012. Viewing, perhaps
14 more than any other metric, is the currency of
15 the marketplace when you are talking about
16 buying and selling programs.

17 There is television programs. It is
18 at the very core of marketplace value of
19 programming. We don't argue that viewing in
20 and of itself translates directly into value,
21 which is why the viewing methodology that we
22 introduced, that we present in this case, the
23 regression analysis, is not merely an account
24 of raw viewing data.

25 It reflects an integration of several

1 variables that you would expect a buyer and a
2 seller in a hypothetical market to consider in
3 an open market -- in that open market
4 transaction.

5 Those variables include the time of
6 day of the programs, the number of subscribers
7 with access to the programming, local viewing
8 data, and program type. And as you know, we
9 have presented viewing evidence before you in
10 three royalty distribution phase cases.

11 In the 2000-2003 distribution phase
12 case, you accepted our viewing methodology.
13 This is what you said about it then: "First,
14 the Judges agree with Dr. Gray that viewership
15 can be a reasonable and directly measurable
16 metric for calculating relative market value in
17 cable distribution proceedings."

18 Indeed, the Judges conclude that
19 "viewership is the initial and predominant
20 heuristic that a hypothetical CSO would
21 consider in determining whether to require a
22 bundle of programs for distant retransmission,
23 subject to marginal adjustments needed to
24 maximize subscribership."

25 That's what you said. The D.C.

1 Circuit affirmed your decision as to Program
2 Suppliers in that case.

3 We have the 2004 through 2009 cable
4 and a 2000 through 2009 satellite cases,
5 allocation phase cases before you. And we have
6 recently filed the 2010 through '13 allocation
7 phase before you. Both cases rely on viewer
8 methodology.

9 As always, we -- we expect almost all
10 of the parties to challenge the viewing
11 methodology on various programs -- on various
12 grounds, I'm sorry. You have heard some of the
13 arguments against viewing. You have heard the
14 argument about whether or not it is relevant,
15 since there is no advertised -- since viewing
16 typically is useful advertising.

17 You have heard the argument about the
18 data itself, something is wrong with the data
19 itself. You have probably heard the argument
20 that perhaps it is not -- it is only -- it is
21 only useful for the distribution phase as
22 opposed to the allocation phase.

23 We have heard that all before. We
24 don't claim that viewing itself is perfect,
25 that viewing methodology is perfect. As a

1 matter of fact, no single methodology in this
2 proceeding is perfect as the evidence and the
3 cross-examination and the rebuttals will show.

4 But what we do argue is that it is the
5 most directly or it is the most persuasive
6 evidence with regard to the market value
7 standard. It is the one standard that you can
8 take a look at and relate to what's going on
9 and what would happen in a market without a
10 compulsion license.

11 And some of these arguments are
12 somewhat distracting. Take the advertising
13 argument, for example. The argument is viewing
14 is only relevant when you need ratings. But
15 that argument presumes that, in the world
16 without compulsory license, the preclusion of
17 altering signals such that you can't insert
18 advertising, will continue beyond a market --
19 into a market where advertising -- where there
20 is no regulation. It is a distraction.

21 JUDGE STRICKLER: Are you saying that
22 when we conceive of the hypothetical market, we
23 should assume a market in which you could
24 insert advertising? Is that your point?

25 MR. OLANIRAN: Yes, Your Honor, at

1 least -- at least not -- not assume that the
2 prohibition against alternate signals such that
3 you can insert advertising will continue to
4 exist beyond the regulation, beyond the
5 expiration of the regulation.

6 JUDGE STRICKLER: Or in the absence of
7 any regulation, there would be no prohibition?

8 MR. OLANIRAN: Yes.

9 JUDGE STRICKLER: So that, in other
10 words, again, just so I understand, you say the
11 hypothetical market that you think we should
12 consider should be one in which that
13 restriction about inserting advertising for the
14 retransmitted signal does not exist because it
15 is a regulatory provision, not a requirement in
16 a marketplace?

17 MR. OLANIRAN: That's correct, Your
18 Honor.

19 JUDGE STRICKLER: Thank you.

20 MR. OLANIRAN: You will receive
21 testimony that calculates viewing and value for
22 each program, unlike many of the methodologies
23 that you will receive into evidence.

24 And there will also be testimony that
25 the division of the proceeding between

1 allocation phase and the distribution phase or
2 Phase I or Phase II is really more of an
3 administrative and judicial -- administrative
4 and judicial efficiency purposes, not based on
5 any economic reason or not based on any legal
6 reason.

7 So to the extent the parties argue
8 that while it fits better in a Phase II or it
9 fits better in a Phase I, it really has nothing
10 to do with how the market actually works. That
11 concept is really a relic of the compulsory
12 licensing scheme and how distribution of
13 royalties are administered.

14 The second reason is this, and it sort
15 of ties into what I said earlier. Unlike any
16 other methodology that is presented in this
17 case, we will show that our viewing methodology
18 is not a mere theoretical concept with regard
19 to the value of programming in this case. It
20 is not mired in abstract concepts or complex
21 calculations or contrived notions of what the
22 buyer -- how the buyers and sellers would
23 behave in a hypothetical marketplace.

24 We intend to show that, instead, that
25 viewing fits the expectation, if you will, that

1 one would have concerning what the transaction
2 flow in an open marketplace would look like,
3 absent the compulsive license. And here is
4 what I mean by that.

5 Here is what the current market looks
6 like. The current market actually starts from
7 a primary market, which is a copyright owner of
8 a program engages the broadcaster, let's say
9 for a sitcom or talk show, and licenses that
10 show to the broadcaster for exploitation within
11 the local market.

12 And then comes the cable system
13 operator, retransmits the signal out of market
14 and delivers it to another market, the addition
15 of which is a further exploitation of that
16 show.

17 So the current compensation scheme is
18 the cable system pays the Copyright Office
19 based on the statutory, the prescribed fee, for
20 carrying that entire signal, which embedded in
21 that signal, of course, is the -- is the Ellen
22 DeGeneres show, let's say, which the producer
23 or syndicator now is looking to be paid.

24 So the Copyright Office -- the
25 Licensing Division, rather, and you have the

1 fun of now telling all of the owners of the
2 talk shows and the syndicated shows about how
3 this money should be divvied up.

4 So then what should the market look
5 like? Is the market going to look the same way
6 and we have to come up with a construct where
7 the copyright owner gets paid, or are the cable
8 systems going to be going to each copyright
9 owner and buying individual programs to air
10 where, is the question?

11 Are we going to have a much more
12 efficient way whereby the copyright owner sells
13 to the station and the station has an
14 arrangement with the -- with the cable system
15 operator, and some rights are exchanged and
16 compensated for in that process?

17 That's the question that I'm hoping
18 you will be asking with all of these various
19 methodologies.

20 JUDGE STRICKLER: Will you have an
21 economist who testifies, or is that Dr. Gray
22 who will be testifying as to that, to the
23 details or the contours of that hypothetical
24 market?

25 MR. OLANIRAN: Dr. Gray will speak to

1 that to some extent. And I think also
2 Ms. Hamilton will be able to speak to how she
3 thinks the market would work -- how the
4 hypothetical market works, sorry.

5 The third reason why we think we
6 deserve what we're asking is this: It is no
7 secret that Program Suppliers have disagreed
8 with the Bortz survey going back to the
9 beginning of time. But for the first time in a
10 proceeding we present a survey of cable
11 operators that replicates the Bortz survey.

12 Now, we didn't do that because we
13 agreed with the Bortz survey. We did that
14 because for several years we had always had
15 challenges to Bortz, but we could never really
16 hone in on what -- we talked about what the
17 problems were and we erased some of those
18 problems with the decision-makers, but we could
19 never get to the heart of -- we could never
20 substantiate those problems.

21 So for the first time we decided to do
22 our own survey. And that's the Horowitz
23 survey. This is significant evidence. In
24 fact, in sports parlance, it is what you would
25 call a game changer.

1 In our view, our survey evidence
2 out-Bortz the Bortz survey. It does what Bortz
3 purports to do, but does it better.

4 This survey, among other things,
5 created an other sports category, and has
6 program category definitions or programming
7 examples, calls to mind the questionnaire to
8 focus on signals carried by respondent systems,
9 took on adding Public Television only and
10 Canadian only signals, which Bortz had refused
11 to do.

12 And if you look at the history of
13 allocations to the Public Television category,
14 it is very telling, that this made a difference
15 in that allocation. We also remind the
16 respondents not to assign any value to
17 substituted programming on WGNA.

18 Now, I will echo Mr. Lutzker's
19 articulation of what's going on with WGNA with
20 regard to what appears to be some additional
21 adjustment that some of the parties want to do,
22 want to make with respect to the programming
23 for Program Suppliers and Settling Devotional
24 Claimants.

25 At a minimum this is troublesome

1 because, while they go through -- while JSC
2 went through this elaborate process to
3 interview the WGN-only cable systems, they
4 don't do the same thing for systems that carry
5 WGNA and other signals.

6 So the two simply -- those two notions
7 simply don't agree with each other, as Mr.
8 Lutzker said.

9 Further, to the issue of Bortz versus
10 Horowitz, we will show that having the ability
11 to compare the Horowitz and the Bortz surveys
12 reveals many of the challenges with Bortz
13 survey evidence -- with survey evidence in
14 general, and Bortz survey evidence
15 particularly.

16 And some of the Bortz problems that we
17 found in the course of doing our own survey
18 include the following: Live team sports is
19 overvalued under the Bortz survey because it
20 absorbs the share of other sports that
21 traditionally do not fall within the live team
22 sports programming and would instead fall
23 within the Program Suppliers programming.

24 And, conversely, the Bortz results
25 under-value the Program Suppliers' category

1 when you add the movie and syndicated
2 categories together because of its failure to
3 create an "other sports" programming category.

4 Also, the old and revised Bortz survey
5 questions are complex, they are confusing, and
6 yields results that are neither valid nor
7 reliable.

8 If you look at the new version of the
9 Bortz survey, the warm-up questions, one is --
10 one concerns ranking the importance of the
11 program categories.

12 The second has -- it is another
13 ranking exercise with regard to how expensive
14 the programming, or program categories, ranking
15 the programs in order of how expensive they
16 are.

17 Just the question itself presents
18 maximum problems because it is not clear
19 whether the question is asking about how
20 expensive, ranking by how expensive or ranking
21 by cost.

22 Well, setting that aside, all three
23 questions in the Bortz questionnaire do not
24 tell you, none of the questions tell you what
25 market did the interviewer intend for the

1 respondents to be thinking about, and how does
2 the respondent in response to that question
3 understand whether when you asked -- when you
4 asked a respondent, well, how would you have
5 allocated a fixed dollar amount, is it how
6 would you have allocated a fixed dollar amount
7 with regard to what we did in 2010 when the
8 compulsory license existed or are you asking
9 me, are you asking me, the respondent, to think
10 about a market in which a regulation didn't
11 exist?

12 So there is this question of what is
13 the respondent responding to? And the other
14 question is what did the interviewer intend for
15 the respondent to respond to? And you will
16 find that issue on all three questions.

17 And then within each question itself
18 is the question of consistency of language. Do
19 you mean how expensive or do you mean cost?
20 And when you -- when you list the number of --
21 the number of -- the program categories, when
22 you list them in the same way for two questions
23 and then you change them slightly in the third
24 question, that's also a problem.

25 And then there is the overriding issue

1 of within ten minutes, whether it is the
2 ranking exercise, the two ranking exercises, or
3 the valuation exercise, which is the constant
4 sum question, Dr. Steckel goes to great detail
5 about this 14-step exercise that the
6 respondents have to engage in in responding to
7 the question.

8 But the summary is basically this: If
9 you have a system that is carrying eight
10 signals, in responding to a ranking exercise or
11 valuation exercise, here is what they have to
12 do.

13 They have to first remember all eight
14 signals, WA-1 through 8. And then they have to
15 aggregate the content of those signals in their
16 head. And then they have to subtract from that
17 aggregation what's non-network.

18 And then after they do that, depending
19 on what they are doing, whether it is relative
20 valuation or ranking for how expensive or
21 ranking by how important, they now have to
22 remember, okay, so I have these eight
23 categories, which I don't have -- which I don't
24 necessarily do in my -- use in my business
25 every day, and then plug in the remainder of

1 the -- the -- the balance of the compensable
2 programming that is left and somehow make that
3 allocation.

4 There is no -- they don't know what
5 volume they are being asked to look at. They
6 just know we're going to take these eight
7 signals, organize them by the program
8 categories that an interviewer just gave me,
9 and then, after I organize them, or before I
10 organize them, I have to take out ABC, NBC, and
11 CBS programming, and then figure out exactly
12 how I plug them into this ranking exercise or
13 valuation exercise. That's what they have to
14 do in about ten minutes.

15 And that is further complicated by
16 those respondents, most of the interviews
17 occurred sometime in the summer, about July.
18 And so what they have -- and so by that point,
19 at least some of them, if not most of them, the
20 year in question has already passed.

21 So in the case of 2010, which is
22 somewhat unusual, the interviews didn't
23 commence from what I understand until December
24 of 2011. So you are asking respondents in
25 December of 2011 about what they did in 2010

1 with regard to programming.

2 Well, if they were just asking what
3 they did, that would actually resolve some of
4 the -- some of the language issues, but they
5 don't ask them what they did. They say: Well,
6 how would you have allocated this fixed dollar
7 amount in 2010?

8 So the question of what market is the
9 respondent thinking about, the question is, is
10 it how would you have done it in 2010 or is it
11 what did I do in 2010 that a respondent is
12 thinking about?

13 And then what did the interviewer
14 intend for the respondent to think about and
15 how did that questionnaire make it clear that
16 that's what the interviewer wanted the
17 respondents to think about? And what training
18 was given to the interviewer to guide the
19 respondent to the appropriate boundaries.

20 So when I say it is complex, it is
21 confusing, and it yields invalid and unreliable
22 results, that's what I mean by that.

23 And we know this because Horowitz'
24 survey encountered some of this issue. What is
25 most fascinating about this, as you will

1 discover, is that Horowitz has now been
2 criticized for what appears to be failure of
3 respondents.

4 And you will -- you will -- you will
5 see Mr. Trautman's testimony about how great
6 and how sophisticated respondents are. But the
7 moment you see some information Horowitz did
8 does not line up with what's the conventional
9 wisdom about Bortz, then it becomes too
10 confusing. Then the response is: Well, it is
11 too confusing for -- for the respondents.

12 So that's the problem you will see
13 with the Bortz -- with the Bortz survey.

14 And really it is for all of these
15 reasons, because we have done the Bortz
16 exercise, we know that it is fraught with
17 problems, and it is for this reason that we
18 actually asked that no weight be given to the
19 Bortz survey because it does not yield valid or
20 reliable results.

21 With the Judges' permission, I will
22 now read through the list of our witnesses that
23 will be appearing before you and describe very
24 briefly the testimony we hope to elicit -- that
25 we will elicit from them.

1 By agreement of the parties,
2 Ms. Saunders, Mr. John Pasquale, and Ms. Jonda
3 Martin, who were listed, who provided testimony
4 for Program Suppliers, their live appearance,
5 their expected live appearances were waived by
6 all parties so they will not be appearing. But
7 we expect to move their testimony in to be
8 admitted. And I don't think we have any
9 objection to those testimonies.

10 Our first witness is going to be
11 Ms. Sue Hamilton. Ms. Hamilton is the founder
12 and principal of Hamilton Media LLC. And she
13 is the cable supplier -- I mean Program
14 Supplier's cable industry witness.

15 Her depth of experience includes
16 content licensing and distribution, consulting
17 for content providers, negotiating content
18 deals, providing strategic and consulting
19 services for media companies, professional
20 sports teams, and leagues, and collegiate
21 sports teams and conferences.

22 Prior to her consulting work,
23 Ms. Hamilton actually worked for a CSO, Charter
24 Communications, when it was the third largest
25 MSO in operation in the United States. Her

1 highest position at the company was Head of
2 Content Acquisition.

3 Ms. Hamilton's testimony will include
4 how cable operators select programming, how
5 cable operators are likely to value non-network
6 programs on distance signals in an unregulated
7 hypothetical market, and why the Bortz survey
8 is not a reasonable basis for determining the
9 market value of distance signal programming.

10 Her rebuttal testimony addresses the
11 written direct testimonies of Mr. Trautman, Mr.
12 Singer, Mr. Hartman, all of which was submitted
13 by Joint Sports Claimants.

14 She will also address to some extent
15 the written direct testimony of Dr. Crawford.

16 The second witness that will be
17 appearing for us is Dr. Martin Frankel.
18 Dr. Frankel until his retirement this past
19 August was the Professor of Statistics and
20 Computer Information Systems at Baruch College,
21 City University of New York. Dr. Frankel
22 selected the samples of the CSO for the
23 Horowitz survey.

24 Dr. Frankel's rebuttal testimony
25 covers problems with Bortz surveys sampling and

1 estimation procedures that are now apparent,
2 particularly in light of JSC's production of
3 unredacted discovery material.

4 Dr. Frankel also provides corrected
5 weighted estimates and standard errors for the
6 Bortz survey correcting the issues that he
7 identified.

8 Following Dr. Frankel will be Mr.
9 Horowitz, whom I have talked about a little
10 bit. He is the Founder and Chief Executive
11 Officer of Horowitz Research, Inc. That
12 company is a market research company that
13 provides research and consulting services to
14 television and cable, among other companies.

15 Mr. Horowitz presents the Horowitz
16 survey, which closely models the Bortz survey,
17 but corrects several of the Bortz survey
18 shortcomings that the Judges identified in past
19 proceedings, including modifying the
20 questionnaire to utilize representative program
21 examples and include a separate program
22 category for the other sports program category
23 to distinguish between the other sports
24 programs that would fall in the Program
25 Suppliers category versus the live team sports

1 program, which traditionally fall within the
2 Joint Sports Claimants category.

3 For purposes of his rebuttal, Mr.
4 Horowitz analyzed Mr. Trautman's testimony in
5 the 2010 through '13 Bortz report and concludes
6 that the so-called improvements in the 2010
7 Bortz survey have, one, distracted survey
8 respondents from the purpose of allocating the
9 fixed budget in relation to subscriber
10 attraction and retention; two, introduced even
11 more bias in favor of the JSC category by
12 changing the frame of reference from relative
13 value to relative cost and; three, made the
14 2010 through '13 Bortz surveys unreliable by
15 asking respondents about how they would spend
16 -- how much they will spend on disaggregated
17 content.

18 Following Mr. Horowitz is Dr. Joel
19 Steckel. Dr. Steckel is a Professor of
20 Marketing and a Vice Dean for Doctoral
21 Education at Bennett Stern School of Business
22 at New York University. He has designed,
23 conducted, supervised and evaluated hundreds of
24 consumer surveys.

25 Dr. Steckel will testify to challenges

1 with survey evidence in general with respect to
2 assisting the Judges with determining relative
3 marketplace value of the programming at issue
4 in this proceeding.

5 Dr. Steckel will testify also that as
6 between the Bortz survey and the Horowitz
7 survey, that Dr. Steckel finds the Horowitz
8 survey to be preferable, having overcome some
9 of the Bortz flaws.

10 Dr. Steckel will testify that the
11 research approach as such is analysis of market
12 data, and surveys of cable customers would
13 provide data more useful for assessing
14 marketplace return.

15 In his rebuttal testimony, Dr. Steckel
16 will address the written direct testimonies of
17 Mr. Trautman, Dr. Mathiowetz, the joint reports
18 of Gary Ford and Debra Ringold for the
19 Canadians.

20 Following Dr. Steckel, let's see, will
21 be Dr. Jeffrey Stec. Dr. Stec is Managing
22 Director. When Dr. Stec initially wrote one of
23 his reports, he was active with another
24 organization, and he has now switched from
25 Charles Rivers to BRG.

1 But currently Dr. Stec is Managing
2 Director at Berkeley Research Group. It is an
3 international economic consulting firm.
4 Dr. Stec specialized in the application of
5 economics and survey research to the evaluation
6 of various forms of intellectual property.

7 In his rebuttal testimony, Dr. Stec
8 will address the written direct testimony of
9 Drs. Michelle Connolly, Dr. Israel, that were
10 submitted by Joint Sports Claimants.

11 Dr. Stec rebuts Dr. Connolly's report
12 for the Bortz survey as ignoring flaws inherent
13 in the survey.

14 Dr. Stec also concludes from testing
15 the consistency of the Bortz survey responses
16 over time and comparing responses by the same
17 cable system to both the Bortz survey and the
18 Horowitz survey in the same royalty year, he
19 concludes that the Bortz survey is neither
20 valid nor reliable.

21 And just to be clear about that,
22 Dr. Stec's exercise was to take, for example,
23 the same cable system, look at the allocations
24 across the years, and then make comparison to
25 some -- not in the same exercise, take another

1 cable system, cable systems that were common to
2 both the Horowitz survey and the Bortz survey,
3 and look to see whether the allocations were
4 consistent.

5 And it is from those -- actually, he
6 does a few more exercises, and it is from those
7 tests that he concluded that the Bortz survey
8 produces neither reliable -- neither valid nor
9 reliable results.

10 After Dr. Stec's testimony, I believe
11 the next witness will be Mr. Lindstrom. Let me
12 get to Mr. Lindstrom's information. That's
13 correct.

14 Mr. Lindstrom was Senior VP with
15 Nielsen up until his retirement in June of
16 2017.

17 I know there is a trend here, but it
18 is not intentional.

19 JUDGE BARNETT: We should all be so
20 lucky.

21 (Laughter.)

22 MR. OLANIRAN: Mr. Lindstrom is the
23 veteran of these proceedings. He has testified
24 probably a whole lot longer than I have even
25 been involved in the proceedings, but after

1 Ms. Plovnick was born.

2 During his tenure at Nielsen, he was
3 responsible for research design and analysis as
4 part of the Nielsen Media Analytics Group. Mr.
5 Lindstrom will provide information about the
6 Nielsen viewing data on which Program Suppliers
7 rely for this proceeding, including he will
8 also testify to his role in designing the
9 custom analysis of viewing to distant cable
10 households that Program Suppliers commissioned
11 for the years 2010 through 2013.

12 Finally, the final witness will be
13 Dr. Gray, whom you are familiar with. Dr. Gray
14 is an economist and an econometrician. He is
15 the Founder and President of Analytics Research
16 Group relying on certain basic economic
17 principles.

18 Dr. Gray employs the Nielsen data,
19 multiple other data sources, and regression
20 analyses to estimate the level of distant
21 viewing to -- to -- just give me one second.
22 Let me repeat that.

23 Relying on certain basic economic
24 principles, Dr. Gray employs Nielsen data,
25 multiple other data sources, and regression

1 analyses to estimate the level of distant
2 viewing through a random sample of stations
3 caring compensable works for each of the agreed
4 categories and for each of the royalty years at
5 issue.

6 Dr. Gray's economic analysis reduced
7 the relative market value Program Suppliers
8 category, value of Program Suppliers category,
9 for each of the 2010 through '13 funds.

10 Dr. Gray's rebuttal testimony provides
11 analysis and, in appropriate cases, corrections
12 of written direct testimonies of CTV witnesses
13 Dr. Crawford and Dr. Bennett, and JSC witness
14 Dr. Israel, and CCG witness Dr. Lisa George.

15 Dr. Gray criticizes fee regression
16 proposed by Drs. Israel and Crawford as
17 evidence of marketplace value, in large part
18 because the fees regression are based on the
19 statutorily-prescribed fees that we are tasked
20 with figuring out how to allocate in this
21 regime.

22 Further, Dr. Gray concludes that Dr.
23 Israel's analysis of large cable system
24 programming expenditures and Dr. Crawford's
25 comments on the importance -- the importance --

1 just give me a couple of seconds, Your Honor.

2 Okay.

3 I seem to have misplaced my papers.

4 Two seconds, Your Honor.

5 Okay. Now I am back. Thanks for your
6 indulgence.

7 I think -- Dr. Gray concludes that
8 Dr. Israel's analysis of large cable systems
9 programming expenditures and Dr. Crawford's
10 comments on the importance of programming
11 heterogeneity are irrelevant to CSO's carriage
12 choices.

13 And those are our witnesses that will
14 be appearing live.

15 Just to close, among other things, the
16 key elements of our case, the viewing
17 methodology, the applicability of that
18 methodology to a hypothetical marketplace, one
19 without compulsory license, one without
20 regulation, the challenges faced by Bortz
21 surveys as we were able to document with our
22 presentation of the Horowitz surveys, those are
23 the foundations of our case. And we would urge
24 you to take those elements into account as you
25 listen to the evidence before you.

1 As I stated earlier, we disagree that
2 a survey of CSOs is the most persuasive
3 evidence of relative market value of distance
4 signal programming, for a host of reasons, some
5 of which I mentioned and some of which will
6 reveal themselves when the witnesses testify.

7 However, in the unlikely event that
8 the -- that you choose to accord weight to a
9 survey of CSOs, in the unlikely event, we
10 believe that such weight should be
11 significantly -- should be accorded to the
12 Horowitz methodology, to the extent that you do
13 at all.

14 We do believe, however, that, to the
15 extent you are going to accord weight at all,
16 that you should not accord full weight to
17 survey evidence. But if you are going to
18 accord any weight to survey evidence, because
19 of the flaws in the Bortz surveys, because of
20 how much better the Horowitz survey is, that we
21 think the Bortz surveys, we think that the
22 survey evidence that you should take into
23 account should be the Horowitz survey.

24 Because the parties -- because Mr.
25 Stewart and Mr. Garrett and Mr. Lutzker played

1 some of the oldies, if you will, I thought it
2 might be appropriate to play one of our own.

3 In the '90-'92 final determination of
4 the Phase I distribution proceeding, which I
5 think almost everyone left out, here is what
6 the CARP said, in part. They said that "it is
7 disingenuous to say that the cable system is
8 interested only in attracting subscribers, but
9 is totally unconcerned with whether or not the
10 subscriber, in fact, watches the programming."

11 Some of those -- some of -- that
12 sentiment was similarly expressed in the '79 --
13 '78, '79, '83 and '89 CR II decisions.

14 Television was created so that you
15 could fill it with programming and people could
16 watch. It really is that fundamental.

17 And I think with the regression
18 analysis, with the survey evidence and all
19 kinds of contractions purporting to establish
20 marketplace value, that gets lost.

21 The cable compulsory license came into
22 being because, due to the advent of cable
23 technologies, cable systems had the ability to
24 pick up signals, a local signal, retransmit
25 outside of the local to another market.

1 If there was no audience in that other
2 market, we would not even be here. The
3 fundamental reason we're here is because we're
4 trying to figure out how to allocate royalties
5 for programs that were delivered to an audience
6 in another place. That's it.

7 And I say that because throughout the
8 course of this proceeding, our witnesses
9 understand that. Our methodology contemplates
10 that. And that's why I think in our view we're
11 entitled to the amounts that we seek.

12 And for the record, I will just read
13 those amounts. For the 2010 through 2012 basic
14 fund, respectively 44.66 percent in 2010, 41.8
15 in 2011, 33.54 in 2012, 43.52 in 2013.

16 With respect to the 3.75 Fund, Program
17 Suppliers seek 58.86 in 2010; 55.19 in 2011;
18 50.47 in 2012; and 59.19 in 2013. And with
19 regard to the Syndex Fund, we are seeking
20 100 percent for each of those years.

21 And I don't know if Your Honors have
22 any questions for me. I am happy to answer
23 them.

24 JUDGE BARNETT: Thank you, Mr.
25 Olaniran.

1 MR. OLANIRAN: Thank you.

2 JUDGE BARNETT: Mr. MacLean, I am
3 going to switch it up and take those admitted
4 exhibits today. We have a little extra time
5 and, rather than get us off to a slow start
6 tomorrow, let's do that.

7 MR. SATTERFIELD: Excuse me. I have
8 one question related to the exhibits. Kendall
9 Satterfield with the Canadian Claimants.

10 We had two music -- two videos that
11 were filed as part of our direct case. And
12 when we uploaded the exhibits to the docket, we
13 did not upload those videos. We weren't quite
14 sure we could do it. And I see Public
15 Television did it last evening.

16 Before I would do that, I would --
17 these videos were made for using programs that
18 were licensed in Canada. They were created for
19 the use of a -- of a court proceeding in this
20 country. They weren't really intended to be
21 posted on the Internet.

22 So my only request is, if we do it, if
23 we do post them, can we go back and mark them
24 restricted so that they would be limited as to
25 who can access them on the Court's website?

1 JUDGE BARNETT: You have not yet
2 uploaded them?

3 MR. SATTERFIELD: No.

4 JUDGE BARNETT: Or filed them,
5 basically, you haven't filed them?

6 MR. SATTERFIELD: No, that's correct,
7 I have not.

8 JUDGE BARNETT: When you file them,
9 they can -- that's when you make the decision
10 about restricted versus non-restricted.

11 MR. SATTERFIELD: Yeah. My question
12 was really because we had not originally
13 designated any of this evidence as restricted
14 when we circulated it to the parties. It would
15 only be restricted for purposes of the e-mail
16 on the Court's website, the docket's website.

17 JUDGE BARNETT: I see. Why don't you
18 hold off on that. Let me discuss it with my
19 colleagues. If it is --

20 MR. SATTERFIELD: Sure.

21 JUDGE BARNETT: If it has been filed
22 in another Court, it is already a matter of
23 public record.

24 MR. SATTERFIELD: Well, only in this
25 proceeding, only in this proceeding. These

1 videos were filed in this proceeding as part of
2 our evidence.

3 But in -- so they are in a public
4 docket but they are not posted on the Internet
5 to be found in any search.

6 JUDGE BARNETT: But you indicated that
7 the videos were created for another court
8 proceeding?

9 MR. SATTERFIELD: No, I'm sorry, they
10 were created for this proceeding.

11 JUDGE BARNETT: Oh, for this
12 proceeding?

13 MR. SATTERFIELD: For this proceeding.

14 JUDGE BARNETT: Oh, all right. Okay.

15 We will consult and let you know what
16 to do. Meanwhile, don't, don't file them until
17 we reach a decision.

18 MR. SATTERFIELD: Thank you.

19 JUDGE BARNETT: Mr. MacLean, you have
20 the list?

21 MR. MacLEAN: Yes, Your Honor. The
22 parties have agreed to the admissibility -- to
23 the admission of all submitted exhibits, except
24 for Dr. Gray's errata testimony that we have
25 discussed and those amended rebuttal and other

1 amended statements that refer to it. And so I
2 will just read that list.

3 The affected exhibits, that is, the
4 exhibits to which we do not have an agreement
5 for admissibility -- for admission are: 1004,
6 1013, 1014, 1015, 2007, 2008, 2009, 2010, 3001,
7 4028, 5008, 6018, and 6019.

8 With regard to 2007 and 2009, those
9 are -- CTV was clever enough to plan in advance
10 for either contingency. So those are the
11 previous, the prior versions, and they just
12 wanted to reserve on which ones to admit
13 depending on how the breaks go on the motion to
14 strike.

15 With regard to basically all of these
16 exhibits, you know, it is, you know, as I
17 understand it, we're -- we're going to work
18 together to get the right version in once we
19 have a ruling on the motion to strike.

20 So it is not that there is a dispute
21 ultimately about the admissibility of the
22 testimony. It is just a matter of really which
23 version of the testimony comes in.

24 As I was standing up to say this, I
25 was realizing that last night MPAA filed a

1 number of cross-examination exhibits, which
2 would be 6020 and up. I am actually not -- we
3 didn't specifically discuss that, so I'm not
4 certain whether this agreement applies to 6020
5 and up or not. So I will leave that for --
6 those parties who might object to them.

7 JUDGE BARNETT: Thank you. We were
8 not asking for any prospective admissibility,
9 just -- or admission -- just the ones that have
10 been previously identified and listed on the
11 exhibit list. Forthcoming exhibits we will
12 deal with as they are presented.

13 Let's see if there is a way we can do
14 this. The exhibit list consists of exhibits
15 numbered 1000 through 1086, 2000 through 2010,
16 3000 through 3010, 4000 through 4028, 5000
17 through 5008, 6000 through 6019.

18 So unless those -- all of those are
19 admitted, inclusive, except 1004, 1013, 1014,
20 1015, 2007, 2008, 2009, 2010, 3001, 4028, 5008,
21 6018, and 6019. Did I read the list correctly?

22 As to the ones I excepted, we're
23 reserving until we figure out what is happening
24 with the pending motion and any other
25 objections that the parties might have to the

1 admission of those I just listed, the excepted
2 list.

3 (Exhibit Numbers 1000 through 1003,
4 1005 through 1011, 1016 through 1086, 2000
5 through 2006, 3000, 3002 through 3010, 4000
6 through 4027, 5000 through 5007, 6000 through
7 6017 were marked and received into evidence.)

8 MR. MacLEAN: Thank you, Your Honor.

9 JUDGE BARNETT: Is our record clear at
10 this point? Great. Thank you.

11 Mr. Trautman will be up tomorrow; is
12 that right?

13 MR. GARRETT: Yes, Your Honor.

14 JUDGE BARNETT: Do you anticipate him
15 being an all-day witness?

16 MR. GARRETT: He won't be all day on
17 direct examination. I don't know what the
18 other parties have planned, but we think that
19 his direct will be about an hour and a half.

20 JUDGE BARNETT: Oh, all right. And so
21 you will have on deck --

22 MR. GARRETT: We will have someone on
23 deck. That would be Mr. Singer who can follow
24 on if there is time.

25 JUDGE BARNETT: Terrific.

1 MR. GARRETT: If not, then, as I think
2 I indicated earlier, Your Honor, we would go
3 with Dr. Mathiowetz when we all resume next
4 Tuesday, and Dr. Singer -- and then Mr. Singer
5 will follow.

6 JUDGE BARNETT: Okay. So the
7 President's Day holiday is Monday. I will
8 remind you if I can tomorrow about the
9 shutdown, the power outage over the weekend,
10 but try to remind each other of that.

11 JUDGE FEDER: Not shutdown, no.

12 JUDGE BARNETT: Not shutdown, no.

13 JUDGE FEDER: It's a whole different
14 thing.

15 JUDGE BARNETT: Been there. Done
16 that.

17 Okay. Thank you. We will be at
18 recess until 9:00 o'clock in the morning.

19 (Whereupon, at 4:00 p.m., the hearing recessed,
20 to reconvene at 9:00 a.m. on Thursday, February 15,
21 2018.)

22

23

24

25

1 C O N T E N T S

2 OPENING STATEMENTS: PAGE:

3	BY MR. GARRETT:	30
4	BY MR. STEWART:	76
5	BY MR. DOVE:	104
6	BY MR. COSENTINO:	132
7	BY MR. LUTZKER:	152
8	BY MR. OLANIRAN:	184

9

10

11 AFTERNOON SESSION: 132

12

13 CONFIDENTIAL SESSIONS: NONE

14

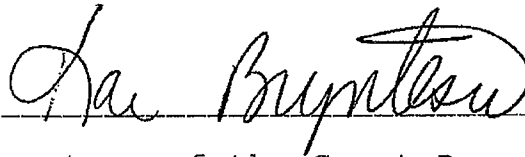
15 E X H I B I T S

16	EXHIBIT NO:	MARKED/RECEIVED	REJECTED
17	1000 through 1003	223	
18	1005 through 1011	223	
19	1016 through 1086	223	
20	2000 through 2006	223	
21	3000	223	
22	3002 through 3010	223	
23	4000 through 4027	223	
24	5000 through 5007	223	
25	6000 through 6017	223	

CERTIFICATE

I certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

2-14-18



Date

Signature of the Court Reporter

<p>0</p> <p>04 [2] 38:15 50:7 04-'05 [5] 54:14 57:7 60:23 61:21 62:23 91:1 04/'05 [3] 31:20 40:10 127:20 05 [5] 38:15 50:7 116:18,25 125:23</p> <hr/> <p>1</p> <p>1 [5] 42:21 62:22 72:25 157:3 158:10 1,000 [1] 73:21 1.5 [1] 49:4 1:30 [2] 130:19 131:1 1:34 [1] 132:2 10,000 [1] 73:22 100 [9] 32:4 35:6 103:1,2,9 124:17 155:16 185:16 217:20 1000 [3] 222:15 223:3 225:17 1001 [1] 2:23 1003 [2] 223:3 225:17 1004 [2] 221:5 222:19 1005 [2] 223:4 225:18 101 [1] 1:16 1011 [2] 223:4 225:18 1013 [2] 221:6 222:19 1014 [2] 221:6 222:19 1015 [2] 221:6 222:20 1016 [2] 223:4 225:19 104 [1] 225:5 1086 [3] 222:15 223:4 225:19 109 [1] 116:17 11:04 a.m [1] 76:17 11:23 [1] 76:18 111 [1] 6:16,21 39:24 45:24 51:2 56:6 93:2 115:21 133:20 186:2,3 119 [2] 7:1 93:1 12 [1] 174:20 12.1 [1] 119:2 12.9 [1] 125:22 12:00 [1] 76:12 12:29 [1] 131:2 1200 [1] 5:7 1233 [1] 4:19 13 [27] 38:13 42:12 43:17 44:18 49:5 50:20 51:6 52:21 53:18 62:25 64:4 77:7 82:24,25 102:18 103:21 114:18 118:17 122:8 124:23 125:2 127:19 128:6 190:6 208:5,14 213:9 13.3 [1] 31:25 13.5 [1] 126:13 131.1 [1] 32:2 132 [2] 225:6,11 14 [3] 1:18 30:21 50:23 14-CRB-0010-CD [1] 6:19 14-step [1] 201:5 14.9 [2] 129:4 130:13 15 [5] 51:21 68:1 76:16 95:18 178:13 179:19 181:14 224:20 15-minute [1] 76:9 15.6 [1] 129:8 15.9 [5] 119:4 120:9,11,11,13</p>	<p>150 [2] 84:2 99:21 152 [1] 225:7 15th [1] 71:19 16 [3] 43:4 103:24,25 160 [2] 40:6 171:10 161 [1] 32:16 1629 [1] 4:5 17.4 [1] 74:5 170 [1] 40:6 176 [2] 117:3 126:22 18 [2] 142:5 174:25 18.8 [1] 126:22 1818 [1] 3:9 184 [1] 225:8 19.5 [1] 104:4 19.7 [2] 129:12 130:13 19.8 [1] 122:7 1970s [1] 157:24 1979 [1] 87:8 1980 [1] 32:12 1980s [1] 36:24 1983 [2] 37:20,20 1989 [3] 37:21 38:1 87:19 1990 [1] 37:21 1990-'92 [1] 149:8 1996 [1] 142:6 1998 [2] 37:22 57:6 1998-'99 [2] 54:9 92:2 1998/'99 [1] 88:15 1999 [1] 154:10 1st [1] 27:11</p> <hr/> <p>2</p> <p>2 [2] 69:10 72:25 2/14/18 [1] 226:9 2:37 p.m [1] 179:20 2:55 [1] 179:21 20 [2] 21:20 51:12 118:24 140:5 142:4 154:11 165:4 174:17 20.8 [1] 129:25 200 [1] 4:11 2000 [5] 90:24 91:7 190:4 222:15 223:4 225:20 2000-2003 [1] 189:11 20001 [2] 2:10 3:20 20004 [1] 2:24 20006 [1] 4:6 2003 [2] 90:24 91:8 20036 [3] 3:10 4:20 5:8 20037 [1] 2:16 2004 [16] 103:23 105:23 116:18,24 117:13 120:4 125:23 140:5 143:12 157:2 162:21 163:7 165:22 166:6 176:10 190:3 2004-'05 [17] 31:17 37:23 43:15 47:21 50:17 89:24 90:16 92:13 118:17 119:23 121:14 122:4 124:3,19,22 126:16,23 2004-05 [1] 119:1 2004-2005 [1] 148:7 2004/2005 [1] 143:10 2005 [5] 105:23 120:5 140:5,5 143:12 163:7</p>	<p>2006 [2] 223:5 225:20 2007 [3] 221:6,8 222:20 2008 [2] 221:6 222:20 2009 [1] 114:20 190:3,4 221:6,8 222:20 2010 [63] 6:15 38:13 42:12,18 43:16 44:18 50:20 51:6 52:21 53:18 62:25 64:4,16 77:7 82:24,25 92:25 102:18 103:21 106:23 110:3,8,12 112:5,18 114:18 115:5 118:17 119:3,17,19 122:7 124:23 125:2 127:19 128:6 130:14 133:1 137:20 139:24 143:14 144:18 177:1 184:11 186:1 190:6 200:7 202:21,25 203:7,10,11 208:5,6,14 212:11 213:9 217:13,14,17 221:6 222:15,20 2010-'13 [7] 31:5 37:23 47:16 53:21 58:13,19 76:3 2011 [10] 51:17 64:18 111:10,15 177:2,2 202:24,25 217:15,17 2012 [9] 64:19 110:25 111:12 177:3 188:3,13 217:13,15,18 2013 [30] 6:15 42:18 51:17,22 64:19 71:10 106:23 110:3,8,12,22 111:15 112:5,19 119:3,17,19 130:14 133:1 139:25 142:6 143:16 144:18,20 146:19 184:11 186:1 212:11 217:15,18 2014 [1] 163:15 2016 [3] 71:19 170:23,23 2017 [5] 27:11 72:10 163:15 172:2 211:16 2018 [3] 1:18 101:12 224:21 202-355-6432 [1] 4:7 202-355-7917 [1] 3:11 202-408-7600 [1] 4:21 202-624-2685 [1] 2:25 202-626-6688 [1] 2:17 202-662-4956 [1] 3:21 202-663-8183 [1] 5:9 202-942-5000 [1] 2:11 20th [1] 4:19 21.6 [1] 50:21 223 [9] 225:17,18,19,20,21,22,23,24,25 25 [1] 84:6 250 [2] 154:24 155:16 2500 [1] 2:15 25th [1] 21:7 27 [1] 46:25 27.1 [1] 122:10 28 [2] 40:8 50:23</p> <hr/> <p>3</p> <p>3 [7] 31:15 39:22 40:6,8 48:4 151:1 163:10 3.38 [1] 147:22 3.4 [1] 166:8 3.75 [10] 30:23 31:6 102:22 103:3,4,6,9 104:6 128:10 217:16 3.9 [2] 166:20 167:1 30 [10] 32:17 38:10 42:1 46:20,24</p>	<p>59:4 66:17 120:5 131:1 225:3 30-minute [2] 64:19 104:18 30-year [1] 38:18 300 [1] 4:5 3000 [4] 111:4 222:16 223:5 225:21 3001 [2] 221:6 222:20 3002 [2] 223:5 225:22 3010 [3] 222:16 223:5 225:22 31 [2] 116:16 124:25 31.4 [1] 129:16 31.9 [1] 116:7 119:5 122:16 33.3 [1] 50:12 33.54 [1] 217:15 34.3 [1] 72:24 35 [1] 86:12 35.1 [1] 56:24 35.2 [2] 31:15 47:20 350 [1] 108:4 365 [1] 94:1 37 [2] 116:10 122:11 37.5 [1] 56:22 38.2 [4] 31:5 47:21,22 56:23</p> <hr/> <p>4</p> <p>4 [4] 81:22 163:9 177:1,2 4.1 [1] 145:22 4.15 [2] 146:16,21 4.5 [3] 50:8 146:16 166:21 4.6 [1] 146:4 4.65 [1] 145:22 4.8 [2] 177:2,2 4:00 [1] 224:19 40 [5] 40:8 42:19 71:8 117:10 155:19 400 [2] 83:8,11 4000 [3] 222:16 223:5 225:23 4027 [2] 223:6 225:23 4028 [3] 221:7 222:16,20 41.7 [1] 31:6 41.8 [1] 217:14 43.52 [1] 217:15 44 [1] 69:20 44.66 [1] 217:14 45 [2] 64:13 82:19 45.7 [1] 72:11 47 [1] 145:7</p> <hr/> <p>5</p> <p>5 [10] 43:10 75:3 103:23 117:13 157:2 162:21 165:22 166:6 176:10 177:1 5.1 [2] 146:4 177:3 5.46 [1] 146:9 5.77 [1] 147:22 5.9 [1] 50:9 50 [2] 166:8 171:3 50.1 [1] 50:12 50.47 [1] 217:18 5000 [3] 222:16 223:6 225:24 5007 [2] 223:6 225:24 5008 [3] 221:7 222:17,20 52 [1] 40:4</p>
--	--	--	---

<p>530 [1] 4:11</p> <p>55.19 [1] 217:17</p> <p>56 [1] 69:22</p> <p>57 [2] 40:4 50:18</p> <p>58.86 [1] 217:17</p> <p>59.19 [1] 217:18</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 [2] 69:15 74:8</p> <p>6.2 [1] 124:23</p> <p>6.55 [1] 139:23</p> <p>6.8 [1] 126:15</p> <p>6.97 [1] 147:6</p> <p>6000 [3] 222:17 223:6 225:25</p> <p>601 [1] 2:9</p> <p>6017 [2] 223:7 225:25</p> <p>6018 [4] 21:4 179:3 221:7 222:21</p> <p>6019 [2] 21:5 179:3 221:7 222:17, 21</p> <p>6020 [2] 222:2,4</p> <p>626-795-6001 [1] 4:13</p> <p>63.1 [1] 43:16</p> <p>691 [3] 64:3,4,13</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 [2] 151:2 162:23</p> <p>7.2 [1] 166:7</p> <p>7.85 [1] 139:24</p> <p>703 [1] 4:19</p> <p>70s [1] 153:20</p> <p>71 [1] 144:5</p> <p>72 [1] 144:6</p> <p>75 [1] 171:3</p> <p>75.1 [1] 43:17</p> <p>76 [1] 225:4</p> <p>78 [2] 143:13 216:13</p> <p>79 [2] 216:12,13</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 [2] 124:25 201:14</p> <p>80 [2] 42:22 144:8</p> <p>80s [2] 80:5 157:24</p> <p>83 [1] 216:13</p> <p>85 [1] 144:8</p> <p>850 [1] 3:19</p> <p>86 [1] 143:15</p> <p>89 [1] 216:13</p> <p>8th [1] 3:9</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9.3 [1] 128:22</p> <p>9.9 [1] 129:25</p> <p>9:00 [2] 224:18,20</p> <p>9:40 [2] 1:20 6:2</p> <p>90 [1] 136:20</p> <p>90-'92 [1] 216:3</p> <p>90s [1] 161:13</p> <p>91101 [1] 4:12</p> <p>92 [1] 37:22</p> <p>94 [3] 74:8 84:1 99:20</p> <p>98 [2] 40:13 69:23</p> <p>98/99 [1] 149:7</p> <p>99 [2] 37:22 57:6</p>	<p style="text-align: center;">A</p> <hr/> <p>a.m [4] 1:20 6:2 76:18 224:20</p> <p>abandoned [1] 61:6</p> <p>Abbey [2] 110:21 111:14</p> <p>ABC [1] 202:10</p> <p>ability [5] 150:4 186:19 198:10 216:23 226:5</p> <p>able [3] 23:6 106:12 121:9 139:18 142:20 176:17 196:2 214:21</p> <p>above [1] 40:3</p> <p>absence [2] 74:14 192:6</p> <p>absent [2] 186:15 194:3</p> <p>Absolutely [1] 180:10</p> <p>absorbs [1] 198:20</p> <p>abstract [2] 187:17 193:20</p> <p>abstruse [1] 153:18</p> <p>Academy [1] 39:7</p> <p>accept [4] 9:2 159:9 162:11 163:12</p> <p>accepted [4] 158:12,25 161:15 189:12</p> <p>accepting [1] 124:18</p> <p>access [3] 8:22 189:7 218:25</p> <p>acclaim [1] 107:1</p> <p>acclaimed [1] 110:14</p> <p>accord [4] 215:8,15,16,18</p> <p>accordance [1] 6:16</p> <p>accorded [1] 215:11</p> <p>according [9] 24:18 116:1 122:4,8 128:6 129:2 166:25 169:9 172:15</p> <p>accordingly [2] 54:22 183:15</p> <p>accords [1] 186:3</p> <p>account [15] 40:7 41:6 55:3 66:22 92:19 117:16 124:1 126:2 139:2, 17 146:1 147:1 188:23 214:24 215:23</p> <p>accounted [4] 92:23 119:2 122:6, 9</p> <p>accounting [1] 40:12</p> <p>accounts [2] 69:9 126:2</p> <p>accurate [5] 8:7 27:16 149:12,14 226:4</p> <p>accurately [1] 149:10</p> <p>achieve [1] 157:19</p> <p>acknowledge [4] 49:8 55:2 65:25 72:4</p> <p>acknowledged [1] 70:4</p> <p>acquired [2] 79:3,5</p> <p>Acquisition [1] 206:2</p> <p>acquisitions [1] 51:24</p> <p>across [3] 93:19 94:3,4 103:19 106:3,13 113:2 210:24</p> <p>across-the-system [1] 93:13</p> <p>Act [3] 6:17 115:22 186:2</p> <p>acting [1] 154:13</p> <p>Action [1] 81:5</p> <p>actions [1] 25:8</p> <p>active [1] 209:23</p> <p>activities [2] 153:24 159:20</p> <p>activity [1] 153:14</p> <p>actual [7] 26:21 95:20,23 99:1 121:15 136:12 137:11</p>	<p>actually [36] 9:6 17:20 32:15 37:15 41:1 48:4 49:10 63:5 65:4 68:14 69:5,18 70:11 72:25 77:11,12 79:9 80:5 82:23,25 88:13,24 95:15 100:24 102:1 127:23 134:1 166:19 183:9 193:10 194:6 203:3 204:18 205:23 211:5 222:2</p> <p>add [11] 62:10 65:2 103:9 154:5,8 157:5 165:13 168:2 174:24 177:10 199:1</p> <p>added [2] 95:9,10</p> <p>adding [1] 197:9</p> <p>addition [4] 51:5 64:8 147:24 194:14</p> <p>additional [3] 27:21,23 28:4 47:9 91:4 161:3 173:5 197:20</p> <p>address [11] 38:5 39:13 42:4 63:8 146:24 149:15 161:5 180:15 206:14 209:16 210:8</p> <p>addressed [3] 25:12 26:15 174:9</p> <p>addresses [2] 166:13 206:10</p> <p>addressing [5] 134:24 135:3,4,14 160:3</p> <p>adjust [2] 105:14 146:25</p> <p>adjusted [4] 55:3 124:1 145:24 146:15</p> <p>adjustment [3] 117:15 146:6,9 150:17,18,20,21 197:21</p> <p>adjustments [4] 54:22 61:18 161:3 189:23</p> <p>ADKINS [2] 2:7 15:5</p> <p>administered [1] 193:13</p> <p>administrative [4] 109:19 185:9 193:3,3</p> <p>admissibility [7] 178:18,19 180:5 220:22 221:5,21 222:8</p> <p>admissible [2] 178:22 179:11</p> <p>admission [3] 8:13 58:16 107:14 178:20 220:23 221:5 222:9 223:1</p> <p>admit [1] 221:12</p> <p>admits [1] 123:25</p> <p>admitted [3] 177:21 178:21 179:6, 6,12,17 205:8 218:3 222:19</p> <p>adopt [2] 21:19 120:9</p> <p>adopted [2] 124:19 128:19</p> <p>advance [3] 89:16 175:19 221:9</p> <p>advancing [1] 175:23</p> <p>advent [1] 216:22</p> <p>advertised [1] 190:15</p> <p>advertising [10] 79:21 90:5 158:2 190:16 191:12,18,19,24 192:3,13</p> <p>advised [4] 28:2,3 162:10,10</p> <p>advisement [2] 11:13 22:23</p> <p>advising [1] 37:6</p> <p>advisor [2] 7:13 96:12</p> <p>advocate [1] 13:6</p> <p>advocates [1] 163:23</p> <p>affairs [7] 80:16 106:19 107:10 110:16 133:6 134:9,16</p> <p>affect [1] 98:8</p> <p>affected [5] 19:24 21:14 50:1 99:1 221:3</p>	<p>affirmative [1] 58:10</p> <p>affirmatively [1] 65:21</p> <p>affirmed [2] 54:10 190:1</p> <p>afraid [1] 33:11</p> <p>afternoon [3] 10:11 76:11,15 132:1 152:6 178:12 180:13 225:11</p> <p>ages [1] 113:24</p> <p>aggregate [2] 143:2 201:15</p> <p>aggregation [1] 201:17</p> <p>ago [2] 32:12 69:7</p> <p>agree [3] 33:12 85:5 135:24 148:17 186:10,12 189:14 198:7</p> <p>agreed [12] 8:12 10:18 11:20 21:10 33:6 79:23 178:18 179:10,17 196:13 213:3 220:22</p> <p>agreement [3] 11:21 13:19 29:16 180:4 185:10 205:1 221:4 222:4</p> <p>agrees [1] 36:16</p> <p>Ah [1] 157:10</p> <p>ahead [2] 148:10 178:23</p> <p>air [5] 80:23 81:13 170:24 171:12 195:9</p> <p>aired [1] 95:5</p> <p>airs [1] 81:12</p> <p>ALAN [1] 2:3</p> <p>albeit [1] 52:16</p> <p>ALBINA [2] 3:6 18:15</p> <p>alert [1] 175:3</p> <p>alerted [1] 13:21</p> <p>ALESHA [2] 3:5 18:13</p> <p>all-day [1] 223:15</p> <p>Allan [2] 33:4 51:11</p> <p>allocate [3] 36:19 41:18 47:13 52:12 61:17 170:13 213:20 217:4</p> <p>allocated [7] 30:23 36:18 44:9 69:19 200:5,6 203:6</p> <p>allocating [3] 35:5 54:9 160:21 185:25 208:8</p> <p>allocation [26] 6:21,25 7:5,6 31:11 77:7 84:23 90:25 117:22 135:25 157:3,15 160:3,15 163:24 165:16 170:13,18 186:9,22 190:5,6,22 193:1 197:15 202:3</p> <p>allocations [5] 53:20 91:16 197:13 210:23 211:3</p> <p>allowed [7] 93:3 133:21 137:21,23 138:4 139:15 151:11</p> <p>allowing [2] 53:4 111:20</p> <p>allows [1] 59:12</p> <p>almost [11] 66:17 68:6 127:6 143:15 148:12 153:10 154:11 164:7 177:19 190:9 216:5</p> <p>alone [3] 91:25 111:14 149:4</p> <p>already [3] 7:3 23:23 26:14 39:14 157:9 187:1 202:20 219:22</p> <p>altering [1] 191:17</p> <p>alternate [1] 192:2</p> <p>alternative [3] 25:8 89:7 147:15</p> <p>although [5] 71:25 101:18 107:24 109:15 185:9</p> <p>Amazing [1] 6:9</p> <p>amended [4] 177:16,17 220:25</p>
---	--	---	--

<p>221:1 America [1] 184:20 American [2] 38:21 157:22 Americans [1] 141:8 among [11] 6:22 52:13 71:5 82:24 91:14 104:10 147:15 159:7 197:4 207:14 214:15 amount [22] 43:13,17 45:1 49:9,9, 11 50:15 93:17 114:23 137:2,4,21 145:8 159:23 168:6 170:14 171:1, 10 173:19 200:5,6 203:7 amounted [1] 64:15 amounts [9] 44:8 68:24 69:15 150: 10 217:11,13 analog [2] 114:22,24 analyses [15] 12:20 74:15,17 99: 16 100:25 101:20 116:11 130:5 135:4 147:25 150:9 151:22 175: 11 212:20 213:1 analysis [59] 34:23 57:4,18,20,23 58:6 59:13 66:15 76:1 85:11,13, 14 89:12,22 90:3,8 91:22,25 92: 15,20 94:8,9 98:15,18 101:6 102: 15 120:10 126:11 135:3,6 136:3,7, 8,10 137:10 145:19,25 146:7,15, 25 150:6 156:23 160:8 161:2,11 173:2 175:4,10 176:7 188:23 209: 11 212:3,9 213:6,11,23 214:8 216: 18 Analytics [2] 212:4,15 analyze [3] 70:25 146:18 150:4 analyzed [1] 208:4 analyzes [1] 156:19 analyzing [2] 70:23 117:10 anchor [1] 75:20 anchored [2] 54:4 59:2 anchors [1] 80:25 Anderson [1] 16:4 ANN [3] 2:21 16:3,4 annually [1] 40:6 another [20] 12:5 20:23 58:25 82: 6 88:16 105:13 114:3 143:7 145:1 154:8 155:22 157:6 194:14 199: 12 209:23 210:25 216:25 217:6 219:22 220:7 answer [2] 23:16 24:1 87:25 106:6 152:25 217:22 answered [1] 27:14 anticipate [2] 181:17 223:14 anticipating [1] 20:13 antithesis [1] 20:7 anybody [1] 71:20 anyways [1] 154:21 apart [1] 77:2 apparent [2] 121:20 207:1 Apparently [1] 6:7 appealed [1] 158:6 appeals [1] 107:20 158:6 appear [7] 34:18 134:5,6,18 150: 14,15 156:7 appearance [1] 205:4 APPEARANCES [4] 3:1 4:1 5:1</p>	<p>205:5 appeared [4] 41:1 61:2 156:10 159:18 appearing [9] 97:20 132:9 134:10 135:9 159:15 204:23 205:6 206: 17 214:16 appears [3] 74:13 197:20 204:2 appendage [1] 154:8 appends [1] 152:21 applicability [1] 214:17 applicable [3] 12:14 187:18,19 application [2] 163:17 210:4 applied [2] 28:20 70:21 applies [1] 222:4 apply [1] 12:15 applying [3] 72:12 121:12 160:19 appreciate [9] 14:16 22:14,25 151: 15 166:12 173:18 appreciating [1] 176:6 approach [9] 54:10 55:11 61:6 78: 13 82:21 103:4 147:17 187:16 209:11 approaches [5] 86:2 105:18 173: 15 187:3,14 appropriate [11] 13:18 26:4 73:19 86:23 89:21 91:21 98:11 117:15 203:19 213:11 216:2 appropriately-increased [1] 104: 5 approximately [2] 74:5 127:19 April [1] 72:10 arbitrary [1] 147:15 arc [1] 86:7 area [4] 37:7 51:3 52:7 79:16 areas [2] 110:20 151:13 argue [3] 188:19 191:4 193:7 argued [1] 120:20 argument [14] 6:20 16:14 18:3 21: 2 166:3 183:2,3,11 190:14,17,19 191:13,13,15 arguments [3] 12:14 190:13 191: 11 arisen [1] 44:19 Arnie [1] 152:7 Arnold [5] 2:8 4:16 15:1,3 17:17 arose [1] 150:3 around [5] 91:2 105:3 111:18 120: 4 172:13 arrangement [2] 12:6 195:14 arrived [2] 153:7 182:23 articulate [1] 157:12 articulation [1] 197:19 artificial [1] 149:23 arts [5] 106:18 110:14 112:7,10 115:17 Ash [2] 157:7,8 ashes [1] 36:10 aside [3] 83:19 128:4 157:5 175:7 199:22 asks [5] 25:15 41:9,12,17 142:22 aspect [1] 114:15 aspire [1] 157:18</p>	<p>asserting [1] 90:2 assertion [2] 24:10 101:9 assess [1] 187:16 assessing [2] 111:25 209:13 assign [2] 63:11 197:16 assigned [2] 64:7 124:16 assist [1] 11:1 assistant [1] 16:24 assistants [1] 17:11 assisting [1] 209:2 associated [2] 8:14 154:15 Associates [2] 70:21 74:7 Association [3] 38:21 77:13,14, 23 184:20,23 assume [4] 19:16 57:16 191:23 192:1 assumed [3] 70:13 124:7,9 assumptions [1] 78:23 Atkinson [1] 135:8 attack [1] 182:3 attempt [4] 40:23 142:21 148:1,6 attempted [3] 19:15 42:3 146:24 attempts [1] 147:20 attend [1] 9:19 attending [2] 28:25 29:3 attention [3] 22:2 174:25 184:15 attorney [2] 7:13,16 attorneys [1] 29:10 attract [4] 88:7,9 137:13 186:19 attracting [2] 91:18 216:8 attraction [1] 208:10 attributable [1] 93:15 attribute [1] 171:16 attributed [2] 95:9 170:9 audience [4] 69:14 101:24 217:1, 5 audiences [4] 107:20 110:4 112:4 114:7 augmented [3] 90:14 124:19,22, 24 125:3 126:1,6 128:17 augmenting [2] 125:11 128:18 August [2] 32:12 206:19 Austin [2] 134:15 140:16 autonomy [1] 108:20 availability [1] 98:24 available [12] 53:10,10,11 81:11 93:17 98:25 118:13 119:9 133:19 138:3 140:13 188:11 Avenue [4] 1:16 2:9,23 4:11 average [12] 31:4 69:13 83:7,13 130:12 143:13,15,18,25 144:4,6 146:22 averaged [3] 103:19 128:22 129: 16 averages [1] 31:1 avidity [1] 122:19 avoid [7] 23:12 24:2 25:18 26:5,6 77:11 139:20 award [16] 31:16,19,25 48:8 75:20 76:2 100:11,12 102:21 103:11 129:24 130:12 151:23,23 188:2,9 awarded [3] 103:23,24 129:15</p>	<p>awarding [1] 163:23 awards [14] 31:10 32:2 54:15,19 59:2 75:21 105:14 111:8,11,12,14 140:1 151:20,24 aware [5] 10:10 11:10,11 12:18 27: 14 away [2] 90:1 103:7</p> <p style="text-align: center;">B</p> <p>back [32] 9:15 16:3 18:9 25:19 29: 5 36:24 37:20 44:6,17 54:7 70:10 75:6 80:4 87:1 95:4 96:4 109:24 123:5 124:21 144:21 154:10 155: 8 158:7 163:14 171:22 177:11 181:20,21 182:10 196:8 214:5 218:23 background [1] 109:23 bad [2] 41:6 75:10 baked [1] 161:1 balance [1] 202:1 balanced [1] 114:8 bar [2] 154:7 162:8 BARNETT [81] 1:10 6:3 7:8,10 15: 8,19,23 16:8,11,15,25 17:4,14,22 18:4,9,19 20:3,17 21:23 22:13,19, 22 26:8 27:17 28:13,18 29:8,13, 18,23 32:6 67:21,25 68:3 76:5,8, 19 78:9 104:14,17 130:16,22,25 132:3 135:15,18 148:14 152:2 153:2 174:20 178:9 179:22,25 180:6,11 182:25 183:6,13,18,21 211:19 217:24 218:2 219:1,4,8,17, 21 220:6,11,14,19 222:7 223:9,14, 20,25 224:6,12,15 Barnett's [1] 156:8 Baruch [1] 206:20 base [3] 53:7 60:6 158:19 Baseball [4] 15:16,17 46:18,18 based [31] 24:9 47:13 61:13 93:5, 24 98:19 105:15 116:10 118:17 119:7 121:11 129:13,23 130:11 136:2 137:15 139:11 146:10 151: 5 162:8,23 163:1 164:20 170:7,19 171:24 188:4 193:4,5 194:19 213: 18 basic [21] 30:23 31:5 38:13 41:24 102:22,22 103:3,12 104:5 128:9, 14,21 129:3,8,12,16 130:2,13 212: 16,23 217:13 basically [14] 24:5,12 35:16 54:14 68:19 82:7 87:23 96:21 143:21 149:1 181:10 201:8 219:5 221:15 basis [17] 35:5 42:22 50:8,20 55:6 60:6 64:15 65:17 66:24 70:6 71:9 84:23 88:21 90:6 100:10 138:22 206:8 basketball [1] 46:18 bear [3] 14:10 97:22 122:23 beard [3] 15:11 16:5 17:20 beards [2] 15:6 16:11 became [4] 110:23 111:17 121:20 159:1 becomes [1] 204:9</p>
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<p>bed [1] 29:5</p> <p>began [3] 90:1 112:8 157:23</p> <p>begin [2] 20:11 77:5</p> <p>Beginning [7] 14:23 25:4 29:25 36:24 153:11 177:12 196:9</p> <p>begrudge [1] 175:20</p> <p>behalf [12] 2:2, 18 3:2, 13 4:2, 15 5:2 15:2, 13 20:12 132:10 152:8</p> <p>behave [1] 193:23</p> <p>behavior [2] 57:13 59:1</p> <p>behind [2] 10:2 28:8</p> <p>believe [42] 24:6, 24, 25 29:15, 15 35:13, 25 53:19 58:14 68:13, 16 70:7 74:13 84:8 94:17 100:10 104:1 114:13 130:19 135:21 137:1, 7, 11, 16 138:8 139:25 146:21 147:10, 18 148:2 150:3, 10, 12 151:3, 19, 20 160:25 167:6 181:8 211:10 215:10, 14</p> <p>believed [2] 101:13 146:12</p> <p>believes [1] 147:22</p> <p>believing [1] 65:22</p> <p>belong [1] 185:22</p> <p>belongs [2] 133:10 165:11</p> <p>beloved [1] 113:4</p> <p>Ben [1] 18:2</p> <p>bench [1] 28:3</p> <p>benchmark [5] 105:14 116:18 119:23, 24 121:13</p> <p>benchmarks [1] 160:14</p> <p>BENJAMIN [1] 4:17</p> <p>Bennett [5] 99:5 101:18, 20 208:21 213:13</p> <p>Berkeley [1] 210:2</p> <p>best [16] 57:10 61:16 63:24 106:6, 6, 9, 9, 18, 23, 23 113:20 145:18 147:20 150:11 158:22 226:4</p> <p>better [14] 46:1, 3 60:5 68:14 106:7, 24 110:19 138:7, 11 184:4 193:8, 9 197:3 215:20</p> <p>between [11] 40:6 56:5 68:22 119:16 130:13 147:13 167:12 173:19 192:25 207:23 209:6</p> <p>Beverly [2] 134:8 140:6</p> <p>beyond [1] 113:4 155:17 176:18 191:18 192:4, 4</p> <p>bias [8] 125:5, 14 146:3 167:12, 18 177:7, 8 208:11</p> <p>biased [3] 128:2 161:10 176:20</p> <p>biases [1] 147:19</p> <p>Big [1] 113:5</p> <p>bigger [2] 66:4 176:13</p> <p>biggest [1] 50:10</p> <p>Bird [1] 113:5</p> <p>bit [13] 12:23 30:9 31:20 48:16 70:18 78:1, 12, 14 85:24 95:23 173:10, 11 207:10</p> <p>bizarre [1] 96:2</p> <p>Blackburn [7] 107:7 117:9, 24 118:4, 12 121:9 129:22</p> <p>blacked-out [1] 63:12</p> <p>blank [1] 161:16</p>	<p>blurred [2] 107:4 112:8</p> <p>Board [1] 169:24</p> <p>Bob [4] 15:1 16:4 30:6 86:13</p> <p>Boggs [2] 2:14 15:12</p> <p>boils [1] 84:8</p> <p>born [1] 184:7 212:1</p> <p>Bortz [168] 34:4 35:14, 20, 23 36:5, 13, 25 37:3, 12, 18, 25 38:5, 8, 9, 13 39:3, 9, 19 41:25 42:2 48:2, 6 51:7 52:15, 21, 25 53:18, 21, 25 54:3, 16, 18, 19 55:2 56:16, 19, 22 57:13, 16 58:4, 13 59:2, 5 61:15, 21, 23 62:1, 3, 4, 7, 24 63:17, 21 73:1 75:21 76:3 85:5, 16, 20 89:6, 14, 17, 23 90:9, 14, 17 92:8 94:11 103:18 116:15 117:15, 16 123:7, 9, 16, 19 124:5, 20, 22, 24 125:3, 8, 11, 15 126:1, 6 127:24 128:1, 18, 18 148:4, 5, 7, 11 149:6, 8, 12 150:1, 15 155:22 159:1, 9 160:19 161:1, 19, 22, 25 162:6, 12, 17, 20 164:6, 25 165:14, 16 166:7, 12 167:1, 10, 21, 24 168:15, 15 175:22 176:25 177:6, 8 196:8, 11, 13, 15 197:2, 2, 10 198:9, 11, 12, 14, 16, 19, 24 199:4, 9, 23 204:9, 13, 13, 15, 19 206:7, 25 207:6, 16, 17 208:5, 7, 14 209:6, 9 210:12, 15, 17, 19 211:2, 7 214:20 215:19, 21</p> <p>Bortz/Horowitz [1] 148:18</p> <p>Boston [2] 108:18 115:10</p> <p>both [30] 11:22 31:1 39:12 44:23 48:14 52:4, 8 56:4, 10, 13, 15 57:8 58:3 63:2 75:22 101:12 105:18 116:13 118:7, 11 134:10 140:2 148:19 153:15, 15 154:5 164:5 190:7 210:17 211:2</p> <p>bottles [1] 59:19</p> <p>bottom [7] 35:10 58:2 85:19 114:14 161:7 176:4, 24</p> <p>Boudreau [5] 133:25 134:6 135:20 140:7 141:14</p> <p>Boudreau's [1] 141:7</p> <p>bought [1] 93:22</p> <p>boundaries [1] 203:19</p> <p>Bounty [1] 112:11</p> <p>brain [1] 11:11</p> <p>branded [1] 81:5</p> <p>Bravo [1] 112:14</p> <p>break [4] 10:9, 13 76:11 180:3</p> <p>breaks [1] 221:13</p> <p>BRG [1] 209:25</p> <p>brief [1] 77:8</p> <p>briefly [9] 30:10 39:18 47:15 56:25 60:21 67:18 87:4 156:4 204:24</p> <p>bring [6] 20:23 21:23 22:1 93:7 97:21 153:21</p> <p>broadcast [19] 37:4 44:23 45:2 49:18 52:13 66:8 80:1 88:3 96:13 97:17 111:13 114:21, 22, 25 115:10 132:24 138:19 148:20 186:6</p> <p>broadcaster [4] 96:10 97:10 194:8, 10</p>	<p>Broadcasters [4] 77:13, 23 79:19 132:15</p> <p>broadcasters' [1] 77:15</p> <p>broadcasting [1] 96:11</p> <p>broadcasts [1] 108:3</p> <p>broadier [3] 49:24 50:1 66:17</p> <p>broadly [1] 142:1</p> <p>Brown [3] 156:14, 21 157:12</p> <p>BRYAN [2] 2:7 15:5</p> <p>Brynteson [5] 1:24 9:23 10:8, 12 226:9</p> <p>bubble [1] 171:25</p> <p>budget [5] 41:18 47:13 52:13 69:20 208:9</p> <p>BUDRON [2] 3:7 18:14</p> <p>build [1] 84:13</p> <p>Building [4] 1:15 18:22, 22 19:1</p> <p>Bulls [2] 46:18 71:13</p> <p>bundle [1] 189:22</p> <p>bundling [1] 98:2</p> <p>Burdick [4] 96:9, 9, 18 100:1</p> <p>Burling [2] 3:17 16:20</p> <p>Burns [2] 33:10 106:15</p> <p>business [12] 12:21 13:9 40:2 83:15 107:10 113:19 134:7, 16 159:25 185:21 201:24 208:21</p> <p>buyer [5] 168:16, 17 18 189:1 193:22</p> <p>buyers [1] 193:22</p> <p>buying [4] 162:1 186:14 188:16 195:9</p> <p>buys [1] 158:3</p> <p>bypass [1] 74:14</p>	<p>calculate [1] 93:3</p> <p>calculated [3] 34:17 124:4 129:7</p> <p>calculates [3] 68:9 129:10 192:21</p> <p>calculating [2] 91:11 189:16</p> <p>calculation [1] 128:13</p> <p>calculations [1] 193:21</p> <p>calendar [1] 80:2</p> <p>call [12] 32:21 33:10, 16 48:6 85:22 118:7, 8 153:2 155:5 156:8 182:20 196:25</p> <p>called [8] 11:22 79:14 83:21 115:11, 14, 15 157:3 164:1</p> <p>calling [1] 11:17</p> <p>calls [1] 197:7</p> <p>came [12] 24:9 32:15 119:23 146:16 147:6 153:8 158:7 164:12 176:10 177:19 182:17 216:21</p> <p>Canada [9] 132:16, 20, 21 134:18 135:21 136:19 138:18, 20 218:18</p> <p>Canadian [52] 4:2 10:22 17:5, 8 34:21 44:11 55:5 117:19 132:7, 10, 16, 24 133:2, 18, 24 136:15, 16, 16, 17, 24, 24 137:2, 4 138:15 139:7, 8, 19, 21 140:18 141:22 142:3, 8, 9, 19 143:9, 11, 13 144:4, 6, 10, 14, 17 145:6 147:5 148:20 149:25 151:11 164:23 165:9 177:4 197:10 218:9</p> <p>Canadians [6] 43:8 123:24 132:13 164:22 165:8 209:19</p> <p>Canadians' [1] 164:17</p> <p>cannot [6] 9:10 33:1 70:4 94:17 149:17 185:4</p> <p>CANTOR [2] 2:5 15:4</p> <p>canvassed [1] 29:1</p> <p>cap [1] 149:23</p> <p>captures [1] 187:23</p> <p>care [1] 180:8</p> <p>career [2] 38:18 96:11</p> <p>carefully [1] 61:20</p> <p>caring [1] 213:3</p> <p>CARP [9] 45:10 54:8 57:8 88:17, 18 149:7 161:13 162:9 216:6</p> <p>carriage [22] 40:20 82:9 83:4 99:13, 25 116:7 118:16 121:25 122:15, 22 127:4, 6, 24 139:1, 9, 12, 13 143:5 147:5 172:22, 25 214:11</p> <p>carried [25] 41:2, 5 42:17 47:1, 9 64:14 65:15 67:11 69:6 78:7 81:14 82:25 83:17, 23 84:2 94:3 97:1 99:21 117:18 124:14 125:8 164:23 168:23 186:6 197:8</p> <p>carries [1] 118:22</p> <p>carry [28] 52:9 55:4 56:9 97:14 109:16 110:2 115:20 116:3 123:10 126:3 139:15, 19, 21 142:2, 12, 24 143:1 151:11, 12 167:12, 13 168:1 172:12, 16, 18, 19 198:4</p> <p>carrying [7] 64:17, 23 136:23 142:19 149:24 194:20 201:9</p> <p>carved [2] 34:24 133:11</p> <p>carveout [1] 133:8</p> <p>case [68] 12:22 13:25 24:25 41:22</p>
--	---	--	--

<p>45:15 52:17 58:9,10 67:5 71:18 78:13,17 81:25 82:12,21 85:8,10 87:7,8,19,20 88:15 89:11,16,20,24 90:16,21,25,25 91:8,13 92:1,3,13 96:7 100:9,12,16 104:2 105:17 130:7 134:24 136:1,2,4,4 137:6,9 138:9 139:16 156:4 174:8 181:2,9, 24 182:6 184:14,17 188:22 189: 12 190:2 193:17,19 202:21 214: 16,23 218:11 cases [17] 39:1 62:2 87:3,21 89:13 106:1 136:19 155:7 160:12 163: 19,21 167:18 189:10 190:4,5,7 213:11 cast [1] 9:25 Cat [1] 113:5 categories [35] 6:22 7:4 37:2,14 40:24 41:1,22 45:18 47:6,14 55:7 56:18 62:11 64:9 68:18 74:25 80: 9 81:10 90:19 94:11,13,20,23 108: 11 133:15 149:19 185:2,12 199:2, 11,14 200:21 201:23 202:8 213:4 categorizing [1] 99:10 category [44] 46:14 56:16 62:8 64: 6,10 65:2 66:3,18,22 77:18,19,25 78:12 80:9,21 81:13 94:21,25 106: 2 108:2,8 124:17 133:16 152:17 155:21 160:25 165:10,11 169:1 173:9 184:25 185:7 197:5,6,13 198:25 199:3 207:22,22,25 208:2, 11 213:8,8 CBAFT [1] 141:19 CBC [5] 132:20 134:8,10 136:20 141:17 CBFT [1] 141:18 CBS [1] 202:11 CBUT [2] 142:24 143:1 CCG [16] 137:2 139:23 140:7,12 142:3 143:9 144:3 145:6,13 147: 19 148:3,21,23 149:18 150:13 213:14 CCG's [2] 132:23 145:21 celebrate [1] 30:1 celebrated [1] 106:13 Census [1] 139:3 Center [1] 39:6 centers [1] 105:3 Ceril [1] 101:21 certain [8] 8:13 60:12 108:11 136: 18 179:16 212:16,23 222:4 certainly [5] 27:1 29:8 54:3 98:17 149:13 181:24 certainty [5] 155:6,14 156:1 158: 14 159:12 163:17 171:8 178:3 CERTIFICATE [1] 226:1 certify [1] 226:3 CFTM [1] 141:15 challenge [1] 190:10 challenges [4] 196:15 198:12 208: 25 214:20 change [16] 10:15 14:9 44:17 45: 25 47:7 48:19,22,24 50:10,14 60:</p>	<p>8 92:22 137:20 145:1,2 200:23 changed [13] 6:7 38:14 48:11 105: 16,20 120:2,21 126:25 128:4 129: 23 130:1,8 154:3 changer [1] 196:25 changes [16] 24:8 25:7,9 27:25 42: 7,11 46:6 58:21 62:24 63:1,2 72: 16,23 73:3 115:24 117:8 changing [1] 208:12 Channel [11] 81:22 112:11,12,13, 21 114:24 115:2,3,11,14,15 channels [16] 83:2,8,9,13 98:2 112:3,6,25 115:1,21,23 119:8 140: 15,24 141:2,4 characters [2] 9:25 113:4 charity [1] 67:7 Charles [1] 209:25 chart [4] 46:12 74:22 90:16 114:9 Charter [3] 51:15,17 205:23 charts [1] 99:17 check [2] 25:19 44:8 checked [1] 7:23 Chicago [2] 42:18 44:24 chief [3] 55:22 97:24 207:10 child [1] 113:12 children [2] 113:13 185:19 children's [8] 106:17 110:14 113: 3,9,16 115:13 133:5 134:17 CHLT [1] 141:15 CHO [2] 3:15 16:21 choices [5] 56:13 62:1 98:8 119:7 127:9 214:12 choose [8] 83:2,2 110:1 123:10,14 139:21 141:12 215:8 choosing [1] 119:10 chose [1] 115:19 chosen [1] 123:21 Christopher [1] 99:4 church [1] 157:10 CIMA [1] 141:15 Circuit [2] 54:12 190:1 circulated [2] 165:25 219:14 circumstances [9] 105:15,20 120: 2,22 127:1 128:4 129:23 130:1,8 City [1] 135:1 206:21 CityCenter [1] 3:18 CKSH [2] 141:18 143:1 claim [32] 30:11,13,17 31:1,7,8,14 47:22 64:11 67:6 68:11,17 78:20 79:22 80:22 97:6 100:15 102:20 103:5 104:4,8 132:23 133:2,12 137:9 151:4,7,8 164:18 175:23 185:17 190:24 claimant [14] 7:4 33:20 36:20 105: 5 106:2 108:1,7 140:8 152:16 154: 18 155:21 157:17 164:22 165:10 Claimants [8] 2:2,18 3:13 4:2,15 5:2 6:23 10:20,21,21,22,22 14:24 15:2 17:5,8 20:12,21 22:6 27:24 30:4,7 31:4,12,24 33:23 34:6,11, 15,21 36:25 38:10 45:13,14 49:4, 15 57:3 75:1 76:22 77:1 78:4 85:5</p>	<p>101:4 104:23 105:1 107:24,25 108:2,15,17,24 117:2 126:11 129: 10,15 132:7,10,13 133:10 147:3 152:5,8,9,13,20,24 153:1 155:11, 19 157:16,20 160:17 164:14,20 165:20 167:23 176:14 185:11,15, 23 197:24 206:13 208:2 210:10 218:9 Claimants' [12] 30:11 47:20 48:14, 15,17 52:23 116:21 126:17,20 129:5 133:2 161:19 claiming [1] 133:14 claims [7] 32:15 143:8 153:13 154: 10 175:19 176:25 184:13 clairvoyant [1] 148:15 clarification [3] 77:9 152:11,17 clause [1] 80:3 clear [11] 9:13,13 47:2,5 73:7 82: 15 115:22 199:18 203:15 210:21 223:9 clearly [8] 10:4 23:19 26:17 27:18 48:25 71:23 94:10 157:15 clerk [2] 7:15,18 clever [1] 221:9 client [3] 14:20 48:6 159:24 clients [2] 37:6 38:12 clip [2] 110:25 111:2 close [7] 13:22 36:4 56:19 83:24 90:18 113:11 214:15 closely [3] 23:4 73:2 207:16 closet [1] 21:24 closing [3] 12:13 20:13 151:10 cloud [1] 19:23 clustering [3] 83:21 97:2 99:18 co-counsel [2] 14:22 132:11 coaches [1] 80:17 coal [1] 89:18 collaboration [1] 113:11 collaborative [1] 180:19 colleague [5] 17:18 152:10,22 154:21 157:6 colleagues [7] 15:3 16:2 18:13 21: 20 29:1 167:6 219:19 collected [1] 171:2 collection [1] 132:14 college [3] 62:15 135:1 206:20 collegiate [1] 205:20 columns [1] 144:3 combine [2] 99:12 143:3 combining [1] 149:22 come [15] 56:13 61:6,15 63:17 70: 1 84:16 108:15 123:5 166:16,20, 25 174:3 176:5 182:1 195:6 comes [2] 26:3 32:2 56:3 68:23 147:21 162:18 194:12 221:23 comfort [1] 57:15 coming [5] 18:24 43:8 75:6 135: 21 172:2 commence [1] 202:23 commenced [1] 85:18 commencement [1] 6:12 commensurate [1] 76:2</p>	<p>comment [2] 87:12 91:23 commented [1] 90:11 commenting [1] 135:5 comments [4] 11:1 158:18 213:25 214:10 Commercial [34] 2:18 10:20 15: 24 34:5 44:11 45:14 48:15 57:3, 17 75:1 76:22,25 77:17,18,19 78: 7 79:1,19,25 80:14 81:8 82:2,10 96:22 97:5 113:25 114:12 117:1 126:17,19 129:10 168:24,25 176: 16 commercial-free [1] 106:17 commercials [1] 158:2 Commission [2] 97:25 138:16 commissioned [1] 212:10 common [1] 211:1 Communications [7] 96:13 97: 25 99:25 153:17 156:15 158:1 205:24 communities [3] 93:8 137:25 151: 14 companies [4] 132:20 184:19 205: 19 207:14 Company [5] 96:14 97:12 206:1 207:12,12 comparable [4] 40:9 43:9 56:14, 23 compare [6] 31:19 55:6 84:22 125: 24 126:5 198:11 compared [3] 56:22 69:18 127:20 compares [2] 31:9 50:6 comparing [3] 66:21 149:20 210: 16 comparison [2] 43:2 210:24 Compass [1] 55:20 compensable [22] 44:20,21,22 45: 1,8 46:4,4,9 47:4 48:21 49:2 50: 16,19 56:7 63:7 115:23 137:4 145: 3,6,9 202:1 213:3 compensated [3] 67:8 169:5 195: 16 compensation [2] 45:20 194:17 competed [1] 112:3 competing [5] 52:2 60:23 86:2,2, 9 103:16 104:11 185:2 competition [2] 107:21 111:24 competitions [1] 152:16 complete [2] 9:8 48:20 completed [2] 40:5 125:8 completely [2] 97:19 98:16 completion [1] 7:6 complex [4] 70:23 193:20 199:5 203:20 complexities [1] 173:13 complicated [1] 202:15 compounded [1] 65:5 comprehensive [5] 84:9,17 98:17 103:16 150:7 comprise [1] 72:6 compulsion [5] 172:22,25 173:4 186:16 191:10</p>
---	---	--	--

compulsive [1] 194:3 compulsory [1] 56:6 153:11,19 171:14 173:22 174:1 191:16 193: 11 200:8 214:19 216:21 compute [1] 128:14 Computer [1] 206:20 con [1] 39:12 conceded [1] 165:8 conceive [1] 191:22 concentrated [1] 141:25 concentration [1] 141:10 concept [6] 69:13 146:10 187:17, 19 193:11,18 concepts [2] 153:18 193:20 conceptually [1] 154:22 concern [3] 91:18 92:4 173:7 concerning [5] 30:15 39:12 43:12 44:19 194:1 concerns [4] 43:12 92:12 161:14 199:10 concise [1] 12:7 conclude [2] 128:3 189:18 concluded [6] 54:2 57:9 91:17 129:23 167:17 211:7 concludes [6] 32:25 208:5 210:14, 19 213:22 214:7 conclusion [6] 68:19 71:14 75:19 102:16 151:18 174:25 conclusions [2] 12:11 56:14 concrete [1] 84:5 conduct [1] 57:17 conducted [12] 37:25 38:9 39:21, 25 42:9 45:4 56:10 57:5,7 125:23 142:4 208:23 conducting [1] 59:5 conference [1] 182:20 conferences [1] 205:21 confess [1] 35:11 confidence [1] 58:7 62:3 91:2 92: 20 155:6 156:1 158:14 159:13 163:16 171:8 178:3 confidential [5] 12:20 13:5,9,12 225:13 confidentiality [1] 14:13 confined [1] 75:13 conflict [1] 172:7 confusing [5] 139:20 199:5 203: 21 204:10,11 confusion [3] 77:11 167:5,7 Congress [4] 1:2,14 114:14,14 Connolly [3] 55:22,24 210:9 Connolly's [1] 210:11 Conrad [2] 134:21 149:15 consented [1] 107:14 consider [7] 11:3 12:19 66:2 86: 23 189:2,21 192:12 considerable [1] 52:6 consideration [1] 40:21 considered [3] 25:9 57:20 91:15 Considering [1] 25:2 consist [1] 184:19 consistency [9] 155:6 156:1 158: 14 159:13 163:17 171:8 178:3 200:18 210:15 consistent [7] 49:10 59:1 126:10 127:15 129:18 155:14 211:4 consistently [2] 48:1 159:5 consists [1] 222:14 consolation [1] 32:10 consolidate [1] 93:7 constant [10] 41:17 61:13 125:25 142:17,22 143:3 149:19,22 150:2 201:3 constitutes [1] 66:17 construct [1] 195:6 consult [2] 12:10 220:15 consultants [1] 113:12 consultation [1] 55:21 consulting [6] 70:22 205:16,18,22 207:13 210:3 consumer [1] 208:24 contacted [1] 182:18 contain [1] 62:19 contains [2] 63:20 185:13 contemplated [1] 186:14 contemplates [1] 217:9 content [44] 107:12 108:21 109:7, 9,11 115:1 136:16,18,21,25,25 137:2 138:14 139:7 142:4 143:9, 13,25 144:6,10,11 147:2,19 148: 22,23,24,24,25 149:20,21,21 160: 24 165:10,21 167:16 169:22,25 184:22 201:15 205:16,17,17 206: 2 208:17 contest [1] 162:4 context [12] 52:16 78:15 88:3 107: 21 170:18,21 171:23,25 172:1 173:1 180:19,20 contingency [1] 221:10 contingent [1] 101:15 continue [3] 93:9 191:18 192:3 Continued [6] 3:1 4:1 5:1 93:7 110:13 114:6 continuously [1] 42:3 contours [1] 195:23 contractions [1] 216:19 contrary [1] 26:23 contrast [5] 84:22 106:21 108:10 112:23 129:3 contributed [1] 35:12 contrived [1] 193:21 controversy [1] 70:18 convenience [1] 185:10 conventional [1] 204:8 conversation [3] 27:22 155:9,10 conversational [2] 10:5,7 conversely [1] 198:24 convert [2] 43:23 54:18 cooking [1] 115:16 cooperation [1] 14:16 copies [5] 8:25 9:4,5,6 13:13 copy [2] 8:16,18 COPYRIGHT [23] 1:1 6:12,15,16 16:22 19:13 41:6,7 45:19 87:21 115:22 117:11 153:17 169:24 185: 16 186:2,4 194:7,18,24 195:7,8,12 Copyrights [2] 54:11 118:2 core [4] 110:20 136:4 161:10 188: 18 corporate [1] 134:9 Corporation [2] 100:4 134:12 correct [12] 18:15 22:18,21 36:2 71:4,15 104:19,20 183:20 192:17 211:13 219:6 corrected [4] 72:7,21 150:23 207: 4 correcting [1] 207:6 corrections [3] 36:3 73:8 213:11 correctly [1] 222:21 corrects [4] 72:3,14,15 207:17 correlated [1] 174:23 correlations [2] 173:19,24 correspond [2] 41:21 70:6 correspondence [1] 27:13 corroborate [3] 35:22 57:12 58:4 85:16,20 90:13 130:7,9 corroborated [1] 58:23 corroborates [2] 94:10 121:18 corroborating [1] 89:14 corroboration [2] 89:22 140:3 COSENTINO [19] 4:9 17:9,12 130: 20,21,21,22,24,24 132:4,5,8,9 135: 17,19 148:16 162:15 164:17 225: 6 cost [3] 199:21 200:19 208:13 couldn't [4] 16:5 33:12 57:16 114: 5 counsel [21] 8:24 9:17 11:2,7,19 14:19 15:3,15 16:24 26:20 27:10 30:3 72:1 76:21 104:22 119:12 132:6 152:2,4 160:2 183:24 country [5] 108:16 113:2 115:7 172:14 218:20 counts [1] 95:17 couple [8] 29:5 36:8 67:11,12 73: 10 156:2 182:3 214:1 course [20] 11:4 12:1 13:23 14:2 26:15 50:10 75:15 81:25 90:23 118:10 151:2 160:16 163:19 182: 7,11,13,17 194:21 198:17 217:8 courses [2] 25:8 156:17 court [9] 9:21,22 58:16 158:6 218: 19 219:22 220:7 226:10 Court's [2] 218:25 219:16 courtesy [1] 12:4 courtroom [1] 20:13 courts [2] 39:2 114:11 cover [3] 26:13 81:1 185:6 covers [2] 98:18 206:25 Covington [2] 3:17 16:20 CR [1] 216:13 crafts [1] 115:17 Crawford [18] 34:7 35:15,21 56:4 97:16,16 101:17 103:20 117:2 126:20 127:10 136:8 137:8 145: 20 173:16 206:15 213:13,16 Crawford's [14] 56:23 99:14 129: 9 139:5 145:13,21,24 146:7 150:6, 19,20,22 213:24 214:9 CRB [2] 149:5 162:10 Create [3] 115:15 121:10 199:3 created [12] 79:4,12 102:13 141:4 153:20 155:20 176:21 197:5 216: 14 218:18 220:7,10 creates [2] 81:19 149:23 creating [1] 102:1 credence [1] 164:18 credible [1] 86:18 credit [1] 171:21 credited [1] 147:3 critical [7] 24:17,24 25:5 99:14 169:21 174:2 187:5 criticism [1] 59:16 criticisms [9] 59:13,22 60:2,4 75: 13 92:12,19 135:5 criticized [1] 204:2 criticizes [1] 213:15 criticizing [1] 101:5 critiques [3] 160:4,12 164:3 critiquing [1] 34:12 cross-examination [3] 27:19 191:3 222:1 cross-examine [2] 8:21 12:1 crossed [1] 19:11 Crowell [2] 2:22 16:1 CRR [1] 1:24 CRT [3] 87:8 162:9 184:5 CSO [6] 147:13 148:1 189:20 205: 23 206:22 CSO's [2] 83:15 214:11 CSOs [7] 83:1,6 142:12 186:3,7 215:2,9 CTV [13] 56:4 86:11 89:11 92:14 95:1,4 97:6 99:18 100:11 103:23 145:14 213:12 221:9 Cubs [1] 46:17 culturally-enriching [1] 113:23 currency [1] 188:14 current [5] 53:6 187:9 194:5,6,17 currently [1] 210:1 custom [1] 212:9 customers [2] 153:21 209:12 cut [1] 162:25	Crawford's [14] 56:23 99:14 129: 9 139:5 145:13,21,24 146:7 150:6, 19,20,22 213:24 214:9 CRB [2] 149:5 162:10 Create [3] 115:15 121:10 199:3 created [12] 79:4,12 102:13 141:4 153:20 155:20 176:21 197:5 216: 14 218:18 220:7,10 creates [2] 81:19 149:23 creating [1] 102:1 credence [1] 164:18 credible [1] 86:18 credit [1] 171:21 credited [1] 147:3 critical [7] 24:17,24 25:5 99:14 169:21 174:2 187:5 criticism [1] 59:16 criticisms [9] 59:13,22 60:2,4 75: 13 92:12,19 135:5 criticized [1] 204:2 criticizes [1] 213:15 criticizing [1] 101:5 critiques [3] 160:4,12 164:3 critiquing [1] 34:12 cross-examination [3] 27:19 191:3 222:1 cross-examine [2] 8:21 12:1 crossed [1] 19:11 Crowell [2] 2:22 16:1 CRR [1] 1:24 CRT [3] 87:8 162:9 184:5 CSO [6] 147:13 148:1 189:20 205: 23 206:22 CSO's [2] 83:15 214:11 CSOs [7] 83:1,6 142:12 186:3,7 215:2,9 CTV [13] 56:4 86:11 89:11 92:14 95:1,4 97:6 99:18 100:11 103:23 145:14 213:12 221:9 Cubs [1] 46:17 culturally-enriching [1] 113:23 currency [1] 188:14 current [5] 53:6 187:9 194:5,6,17 currently [1] 210:1 custom [1] 212:9 customers [2] 153:21 209:12 cut [1] 162:25
--	---

D

D.C [13] 1:17 2:10,16,24 3:10,20 4:
6,20 5:8 54:12 133:23 172:19 189:
25
daily [1] 80:22
Dan [1] 51:11
DANIEL [3] 2:5 15:4 33:4
Danielle [4] 133:25 134:6 140:6
141:13
dare [1] 172:23
data [85] 24:11,18,19,21,23 25:2
27:7,10 41:4 66:16 71:2,10,21,22
72:1,2,3,5,7,13,15,22,73:15,17 74:
1,3,4,7,9,11,14 75:6,10 91:24 93:
17,22 94:5 95:14 100:4,6 116:11

<p>119:17,19 134:12 137:11 138:6,7, 9,14,24 139:2,3 145:12,19 146:18 147:14 150:5,7,10,12 160:8,11 164:21 167:1,10 175:18,24 176: 19,22,22 182:12,17,22,23 188:24 189:8 190:18,18 209:12,13 212:6, 18,19,24,25</p> <p>database [3] 71:1 72:20 102:5</p> <p>databases [3] 70:24 99:7,13</p> <p>Date [1] 226:10</p> <p>daunting [1] 86:20</p> <p>DAVID [6] 1:12 2:20 7:12 16:3 107: 7 117:9</p> <p>day [16] 19:5,5 29:24 59:25 60:8, 17 73:12 77:3 99:11 138:23 150:7 157:8 189:6 201:25 223:16 224:7</p> <p>days [4] 9:19 19:14 94:1 174:19</p> <p>de [1] 67:17</p> <p>deal [10] 36:11 42:7 60:1 75:10 105:20 145:25 157:15 183:6,14 222:12</p> <p>dealing [9] 21:21 45:21 49:21,22 153:16 154:9 162:24 176:12,18</p> <p>deals [1] 205:18</p> <p>dean [2] 135:7 208:20</p> <p>dearly [1] 21:17</p> <p>Debra [2] 135:7 209:18</p> <p>decade [2] 107:11 154:13</p> <p>decades [5] 37:6 153:10 154:2 155:12 156:23</p> <p>December [4] 27:11 182:24 202: 23,25</p> <p>decide [1] 14:9</p> <p>decided [2] 90:24 196:21</p> <p>decision [5] 22:25 88:18 190:1 219:9 220:17</p> <p>decision-makers [1] 196:18</p> <p>decision-making [2] 136:12 140: 23</p> <p>decisionmakers [1] 86:16</p> <p>decisions [7] 40:20 60:6 86:1 137: 15 159:25 178:4 216:13</p> <p>deck [2] 223:21,23</p> <p>decline [1] 166:22</p> <p>declined [1] 50:21</p> <p>decrease [2] 48:8 120:18</p> <p>decreased [2] 45:3 145:10</p> <p>dedicated [1] 115:13</p> <p>dedicating [1] 106:10</p> <p>deem [1] 178:21</p> <p>defined [3] 79:15 108:3,11</p> <p>definition [4] 48:20 79:24 80:7 81: 9 123:17</p> <p>definitions [3] 80:10 155:25 197:6</p> <p>DeGeneres [1] 194:22</p> <p>degree [3] 66:11 158:22 176:11</p> <p>deleted [1] 125:12</p> <p>deletes [1] 168:9</p> <p>deliberate [1] 138:5</p> <p>deliberately [2] 181:1,7</p> <p>deliver [4] 93:9 114:1 156:9 184: 15</p>	<p>delivered [1] 217:5</p> <p>delivering [1] 18:18</p> <p>delivers [1] 194:14</p> <p>demands [1] 79:13</p> <p>demerits [1] 11:6</p> <p>demographic [1] 139:2</p> <p>demonstrated [1] 71:2</p> <p>depend [1] 20:8</p> <p>depending [2] 201:18 221:13</p> <p>depends [2] 32:24 103:10</p> <p>depicted [1] 69:1</p> <p>deploying [1] 114:19</p> <p>deposited [2] 6:14,21</p> <p>deposits [1] 7:1</p> <p>depth [1] 205:15</p> <p>describe [9] 30:10 78:11,16,25 90: 22 95:13 96:21 99:9 204:23</p> <p>described [3] 92:11 158:17 167:7</p> <p>describes [2] 107:19 110:12</p> <p>describing [3] 88:18 99:16 100:14</p> <p>description [1] 143:20</p> <p>deserve [2] 95:7 196:6</p> <p>design [4] 58:18 98:21 99:2 212:3</p> <p>designated [1] 219:13</p> <p>designation [1] 39:15</p> <p>designed [5] 61:20 94:18 149:7 153:20 208:22</p> <p>designing [1] 212:8</p> <p>desire [1] 112:19</p> <p>desired [1] 13:6</p> <p>dessert [1] 153:25</p> <p>detail [7] 63:4 78:17 117:5 149:16 156:2 161:6 201:4</p> <p>details [1] 195:23</p> <p>DETERMINATION [4] 1:6 101:15 119:16 216:3</p> <p>determinations [1] 161:4</p> <p>determine [11] 6:13 11:18 37:1,12 52:12 77:6 101:7 105:6 138:10 167:11 174:11</p> <p>determined [2] 121:14 163:8</p> <p>determining [4] 86:3 189:21 206: 8 209:2</p> <p>develop [1] 113:13</p> <p>developing [2] 86:8 107:11</p> <p>development [3] 43:19 87:5 113: 12</p> <p>Devotional [47] 4:15 5:2 10:22 20: 20 34:11 45:13,17 46:22 48:17 54: 25 101:4 133:10 152:5,8,9,13,16, 19,24,25 155:11,19 157:16 160:6, 17,24 161:19 163:5 164:13,18,20, 22,25 165:9,20,24 166:2,4,6,15,24 167:16,23 168:4 169:25 173:9 197:23</p> <p>Devotionals [3] 17:15 161:23 163: 11</p> <p>devotionals' [1] 164:5</p> <p>DHX [1] 134:16</p> <p>dial [2] 106:20 112:21</p> <p>diced [1] 35:8</p> <p>difference [9] 24:20,21,22 93:16</p>	<p>119:16 163:11 164:8 167:20 197: 14</p> <p>differences [4] 56:12 94:12 104: 10 164:2</p> <p>different [43] 26:16 31:13 33:19, 21 34:13 35:9 36:20 37:2,8,13 40: 24 41:19,21 47:5 52:20 54:21 55: 7 67:12,12 74:24,25 80:8 82:4,8 83:9,17 86:16 91:19 92:24 98:21 105:4 112:5 121:7,12,16 133:3 140:8 141:4 142:14 176:2 185:12 187:3 224:13</p> <p>differentiate [1] 53:8</p> <p>differentiated [2] 107:2 111:21</p> <p>differentiation [1] 112:22</p> <p>differs [1] 139:4</p> <p>difficult [1] 10:6</p> <p>difficulties [1] 10:14</p> <p>digital [2] 114:22 115:1</p> <p>diligently [1] 13:11</p> <p>DIMA [2] 3:7 18:14</p> <p>diminishes [1] 173:6</p> <p>dinner [1] 153:3</p> <p>direct [22] 10:12 11:23 13:17 21: 10 30:20 88:13 89:16 96:8 100:3, 9 101:19 162:13 163:21 181:17 206:11,15 209:16 210:8 213:12 218:11 223:17,19</p> <p>directed [4] 26:12,18,21 100:19</p> <p>direction [1] 112:5</p> <p>directly [18] 21:4 30:20 41:5 45:21 50:15 51:4 68:11 69:2 91:10 98:3 125:23 143:5 186:22,25 187:23 188:20 189:15 191:5</p> <p>director [6] 16:22 38:7 134:9,15 209:22 210:2</p> <p>directs [1] 19:25</p> <p>DirectTV [1] 51:22</p> <p>disaggregated [1] 208:16</p> <p>disagree [2] 75:2 215:1</p> <p>disagreed [1] 196:7</p> <p>disappear [1] 43:22</p> <p>discarded [4] 123:22 124:6,7,9</p> <p>discards [1] 117:17</p> <p>disconnect [1] 68:22</p> <p>discover [5] 24:13,14 25:16 27:6 204:1</p> <p>discovered [3] 24:10 25:1,16</p> <p>discovery [7] 25:11 26:12,18 164: 21 167:11 181:4 207:3</p> <p>discredited [1] 36:8</p> <p>discretion [1] 9:20</p> <p>discuss [3] 30:13 42:14 63:22 92: 2 123:25 160:22 219:18 222:3</p> <p>discussed [2] 161:6 220:25</p> <p>discussion [2] 156:18 179:18</p> <p>discussions [1] 181:21</p> <p>disguise [1] 17:22</p> <p>disingenuous [1] 216:7</p> <p>dispute [4] 154:12,14 186:8 221: 20</p> <p>distance [57] 41:1,11 42:17,23,25</p>	<p>43:1,5 47:1 49:23 50:2 52:16 56:8 60:17 64:14 65:9,16 66:11,24 67: 14 69:6 70:11 71:6,9 73:23 74:12 77:21 78:8 81:15 83:4,13,16,18, 22,23 93:10,11 94:3 97:1,8,14 98: 9 99:24,24 100:7 102:8,12,17 117: 19 126:3 133:24 151:11 170:24 186:15 188:12 206:6,9 215:3</p> <p>distant [33] 24:11,19 42:21 43:3,6 74:4 82:1 110:2,4 116:4,9,23 118: 18,19,20,22,24 119:2,4 121:24 122:3,7,10 123:11 127:5,7,18 185: 22 186:6 189:22 212:9,20 213:1</p> <p>distantly [2] 115:20 132:25</p> <p>distantly-retransmitted [1] 124: 12</p> <p>distinct [1] 49:22</p> <p>distinctly [2] 136:15 140:8</p> <p>distinguish [1] 207:23</p> <p>distinguishing [1] 112:24</p> <p>distracted [1] 208:7</p> <p>distracting [1] 191:12</p> <p>distraction [1] 191:20</p> <p>distribute [1] 109:11</p> <p>distributed [5] 73:19 143:22 144: 9,13 166:10</p> <p>distribution [17] 6:14 38:24 90:24 91:8,12,13 92:2 152:15 154:9 189: 10,11,17 190:21 193:1,12 205:16 216:4</p> <p>distributions [1] 154:15</p> <p>distributors [2] 53:5 184:21</p> <p>dive [1] 7:25</p> <p>diverse [1] 185:1</p> <p>divide [2] 34:18 82:22</p> <p>division [2] 192:25 194:25</p> <p>divvied [1] 195:3</p> <p>DMA [5] 79:15 82:4,6,8,11,13</p> <p>DMAs [1] 83:24</p> <p>Docket [3] 6:18 218:12 220:4</p> <p>docket's [1] 219:16</p> <p>Doctoral [1] 208:20</p> <p>Doctorate [1] 117:24</p> <p>doctors [1] 173:17</p> <p>document [5] 9:11 23:9 24:1,12 214:21</p> <p>documentaries [1] 115:12</p> <p>documents [9] 13:12,13,16 23:7, 22 25:24 26:3 27:14 177:21</p> <p>Dog [1] 112:11</p> <p>doing [7] 7:18 55:14 67:21 156:23 182:11 198:17 201:19</p> <p>dollar [4] 159:23 200:5,6 203:6</p> <p>dollars [2] 154:24 155:16</p> <p>domain [1] 19:25</p> <p>dominant [2] 159:2 170:9</p> <p>DOMINIQUE [2] 3:5 18:14</p> <p>done [21] 59:14,15 76:13 81:18 82: 16 91:6 95:20 97:18 102:8 145:20 151:18,19,22 158:22,22 159:4 163:1 166:5 203:10 204:15 224: 15</p>
---	---	--	--

<p>double [4] 21:19 106:1 116:24 126:14</p> <p>doubled [1] 126:8</p> <p>doubling [1] 126:9</p> <p>DOVE [19] 3:14 16:18,19 17:1,3 104:17,20,24,25 111:3,6 119:14, 21 120:7,12,19 121:6 130:16 225:5</p> <p>down [16] 19:7 43:21 48:4,17 50:11 84:8 114:13 120:9 135:21 144:12,15 171:2,3,4 184:3 185:4</p> <p>downgraded [1] 167:24</p> <p>Downton [3] 110:21,21 111:13</p> <p>downward [1] 177:7</p> <p>drafted [1] 7:14</p> <p>drama [4] 110:15,23 180:15 185:18</p> <p>dramatic [2] 154:14 175:25</p> <p>dramatically [5] 114:18 116:15 127:6 138:2 154:3</p> <p>dressed [1] 184:5</p> <p>driver [1] 79:20</p> <p>drop [3] 162:20 166:4,8</p> <p>dropped [2] 33:11 163:6</p> <p>Drs [4] 98:22 142:4 210:9 213:16</p> <p>dubbed [1] 141:3</p> <p>due [4] 114:19 163:19 182:16 216:22</p> <p>Duke [1] 55:23</p> <p>duplicative [1] 118:8</p> <p>duration [1] 7:14</p> <p>during [29] 10:9 11:4 13:23 14:2 20:13 22:5,5 38:10 41:3 42:17 44:14 49:12 50:22 51:16 59:3 64:3 75:15 77:21 80:2 83:6 96:14 106:24 110:18,22 111:19 134:2 145:4, 10 212:2</p> <p>DUSTIN [2] 3:15 16:21</p> <p>duties [2] 7:21 8:2</p> <p>duty [1] 7:18</p> <p>dynamics [1] 98:6</p> <p>E</p> <p>e-mail [2] 27:13 219:15</p> <p>e-mails [3] 25:20,20,23</p> <p>each [51] 10:11,11 11:21,21 12:1 14:18 21:12 23:16,16 24:1 31:18 36:20 37:19 40:4,9 41:13,19 42:20 47:5 51:9 56:11 59:10 64:15 66:19 74:24 84:14 95:18 102:23 105:5 106:3 108:9,20 109:17 117:4 121:18 124:4 130:9 164:3 173:15 186:19 188:2,12 192:22 195:8 198:7 200:17 213:3,4,9 217:20 224:10</p> <p>earlier [15] 25:11 47:22 55:18 56:20 105:2 135:25 140:9 143:20 145:4 147:12 148:8 180:17 193:15 215:1 224:2</p> <p>early [4] 13:10 157:24 168:10 183:22</p> <p>earmark [1] 36:17</p> <p>earn [1] 114:7</p>	<p>earned [1] 112:25</p> <p>echo [1] 197:18</p> <p>econometric [1] 116:19</p> <p>econometrician [2] 99:5 212:14</p> <p>econometrics [1] 160:8</p> <p>economic [10] 12:20 79:20 89:5 98:8 156:17 193:5 210:3 212:16, 23 213:6</p> <p>economics [4] 117:25 135:1,13 210:5</p> <p>economist [5] 55:22 97:24 98:6 99:5 195:21 212:14</p> <p>economist's [1] 98:11</p> <p>economists [2] 117:8 138:9</p> <p>eCRB [4] 8:8 19:22,25 178:25</p> <p>edited [1] 13:12</p> <p>Education [1] 208:21</p> <p>educational [5] 108:5 113:6,12,22 185:20</p> <p>effect [2] 45:11 97:2</p> <p>effects [1] 21:9</p> <p>efficiency [1] 193:4</p> <p>efficient [1] 195:12</p> <p>effort [1] 36:2</p> <p>efforts [1] 99:12</p> <p>eight [5] 134:4 153:13 201:9,13,22 202:6</p> <p>either [5] 42:24 61:11 100:25 181:16 221:10</p> <p>elaborate [3] 161:8,21 198:2</p> <p>electronic [5] 8:1,2,8,15,19 9:11</p> <p>electronically [2] 9:3,9</p> <p>element [1] 172:21</p> <p>elements [3] 184:13 214:16,24</p> <p>elephant [1] 165:19</p> <p>elicit [2] 204:24,25</p> <p>eligible [4] 45:22,23 103:6</p> <p>Ellen [1] 194:21</p> <p>elsewhere [3] 106:22 112:1 141:24</p> <p>embedded [2] 186:5 194:20</p> <p>emerge [1] 73:10</p> <p>Emmy [2] 111:12,14</p> <p>emphasize [4] 55:8,10 186:24,25</p> <p>employs [2] 212:18,24</p> <p>enable [1] 163:18</p> <p>encompass [2] 64:10 108:3</p> <p>encompasses [1] 77:19</p> <p>encountered [1] 203:24</p> <p>end [13] 8:5 12:8 14:5 19:4,5 23:15 76:4 78:19 115:5 120:10 151:5 165:25 176:8</p> <p>endeavor [1] 11:14</p> <p>ended [2] 46:23 166:7</p> <p>engage [1] 201:6</p> <p>engages [1] 194:8</p> <p>England [2] 141:10,17</p> <p>enjoyable [1] 184:11</p> <p>enjoyed [1] 184:2</p> <p>enough [2] 183:16 221:9</p> <p>entered [1] 152:13</p> <p>entertaining [2] 112:17 113:10</p>	<p>entertainment [5] 53:9 112:7,10 133:5 185:18</p> <p>entire [5] 96:11 106:11 133:14 154:22 155:18 194:20</p> <p>entirely [5] 56:11 65:2 112:5 117:17 141:4</p> <p>entitled [7] 14:8 24:6 150:13 184:17 188:1,7 217:11</p> <p>entity [1] 78:4</p> <p>environment [1] 139:15</p> <p>equates [2] 68:9,18</p> <p>equation [1] 43:22</p> <p>equipment [1] 19:3</p> <p>erased [1] 196:17</p> <p>Erdem [5] 101:3 160:7 161:8 167:9 173:23</p> <p>Erdem's [1] 174:25</p> <p>Erkan [1] 160:7</p> <p>errata [13] 22:17 23:7 26:14 28:1,8 101:12 177:13 180:15,24,25 181:4,5 220:24</p> <p>erroneous [1] 72:22</p> <p>error [1] 72:21</p> <p>errors [1] 207:5</p> <p>ERVIN [2] 2:20 16:3</p> <p>escalating [2] 23:13 24:3</p> <p>escalation [1] 26:7</p> <p>especially [1] 10:5</p> <p>ESQ [24] 2:3,4,5,6,7,13,19,20,21 3:3,4,5,6,7,14,15,16 4:3,9,16,17 5:3, 4,5</p> <p>essence [1] 28:5</p> <p>essential [1] 106:16</p> <p>essentially [3] 36:21 39:21 40:16 52:14 57:22 74:23 88:19 90:4 92:23</p> <p>establish [2] 140:17 216:19</p> <p>established [1] 6:24</p> <p>esteemed [1] 154:7</p> <p>estimate [5] 126:23 127:22 128:25 136:5 146:8 154:24 212:20 213:1</p> <p>estimated [4] 116:22 126:12,15, 21</p> <p>estimates [7] 57:10 116:24 127:2, 16 139:6 145:12 207:5</p> <p>estimation [1] 207:1</p> <p>evaluate [5] 59:23 103:17 160:10</p> <p>evaluated [2] 38:17 208:23</p> <p>evaluation [2] 84:9 210:5</p> <p>even [30] 62:14 68:13 70:13 71:8 73:7,22 82:6 88:3,6 95:19,22 96:3 106:24 110:19 114:13 116:10 121:25 123:16 125:11 127:8,12 130:3 150:22 154:12 157:20 161:14 162:13 208:10 211:24 217:2</p> <p>evening [2] 80:24 218:15</p> <p>event [2] 215:7,9</p> <p>everybody [2] 36:16 177:14</p> <p>everyone [2] 29:24 216:5</p> <p>everything [5] 9:9 19:17 98:18 148:22 180:20</p> <p>evidence [7] 6:20 8:10 11:2,5,7</p>	<p>12:9,16 29:11 33:17 53:19 54:1,6, 21 56:1 57:24 58:14 64:12 67:16 68:16 70:8 71:20 77:6 83:20 84:4, 13 85:19 87:10 88:14 89:17 92:6 100:9 104:1,9 105:15,18 120:1 122:3 129:19,24 130:7,11 135:22 136:4,13,14 137:1 140:2 143:8 150:11 162:7 163:5 169:17,21 184:16 187:22,25 188:9 189:9 191:2,6 192:23 196:23 197:1 198:13,13,14 209:1 213:17 214:25 215:3,17,18,22 216:18 219:13 220:2 223:7</p> <p>evolving [1] 37:10</p> <p>exactly [10] 28:17 46:8 48:7,20,21, 23 63:16,18 181:23 202:11</p> <p>examination [1] 223:17</p> <p>examine [2] 11:19 56:5</p> <p>example [12] 68:21 69:24 81:5 95:8 111:10 112:10 115:9 118:21,25 140:25 191:13 210:22</p> <p>examples [13] 63:23 65:7,10,14, 21 69:25 94:19,21,24 96:25 112:16 197:7 207:21</p> <p>exceeds [1] 136:20</p> <p>excellent [1] 113:16</p> <p>except [5] 127:1 140:14 188:3 13 220:23 222:19</p> <p>excepted [2] 222:22 223:1</p> <p>exception [2] 31:23 182:3</p> <p>exceptions [1] 80:4</p> <p>exchanged [1] 195:15</p> <p>exclude [1] 175:24</p> <p>excluded [3] 175:8,9 178:6</p> <p>exclusion [1] 28:21</p> <p>Excuse [3] 20:17 62:7 218:7</p> <p>executive [4] 51:13 97:12 134:8 207:10</p> <p>executives [1] 40:2</p> <p>exercise [11] 199:13 201:2,3,5,10, 11 202:12,13 204:16 210:22,25</p> <p>exercises [2] 201:2 211:6</p> <p>Exhibit [5] 111:4 222:11,14 223:3 225:16</p> <p>exhibits [28] 7:23 8:3,9,14,17 9:1, 2 21:4,4,13 22:9 26:19,22 101:11 107:15 178:17,21 180:5 218:4,8, 12 220:23 221:3,4,16 222:1,11,14</p> <p>exist [3] 192:4,14 200:11</p> <p>existed [1] 200:8</p> <p>expect [7] 32:21 78:18 141:9 143:23 189:1 190:9 205:7</p> <p>expectation [1] 193:25</p> <p>expected [2] 48:22 205:5</p> <p>expend [1] 155:15</p> <p>expenditures [2] 213:24 214:9</p> <p>expense [1] 45:13</p> <p>expensive [4] 41:13 155:2 199:13, 15,20,20 200:19 201:20</p> <p>experience [5] 51:9 52:6 59:4 70:23 98:3 99:6 107:11 117:10 205:15</p>
--	---	---	---

<p>experienced [1] 40:1 expert [19] 23:6 38:16 96:20 97:17 101:23 116:21 117:2 126:11,20 134:20 147:11 151:3 156:14,21 159:19 160:7 168:21 173:5 182: 18 expertise [1] 159:21 experts [11] 86:18 116:12 117:6,7 121:2,8 122:18 176:21 181:16,18 182:9 expiration [1] 192:5 explain [18] 38:12 39:20 42:11 47: 10 52:1,21 56:25 62:19 63:3 65: 19 74:16 78:20 125:7,16 142:12 143:5 170:2 173:24 explained [3] 24:15 88:1 178:5 explanation [1] 161:21 explode [1] 173:13 exploited [1] 171:22 exploitation [2] 194:10,15 exploiting [1] 186:4 explore [2] 73:2 75:15 expressed [1] 216:12 extended [2] 12:5 152:14 extensive [1] 97:18 extent [7] 50:12 159:13 193:7 196: 1 206:14 215:12,15 extra [1] 218:4 extracting [1] 137:16 extraordinary [1] 154:18 extreme [1] 172:3 Eyewitness [2] 81:5,21</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [1] 52:16 faced [2] 52:15 214:20 fact [27] 12:11 13:7 24:19 37:25 55: 1 57:14 61:25 65:24 77:3 84:1 91: 13 94:7 101:25 117:16 122:17 141:14 145:25 149:3 162:17 166: 5 168:14 172:8 173:5 175:3 191:1 196:24 216:10 factor [2] 24:7 139:18 factors [2] 73:4 173:21 failure [2] 199:2 204:2 fair [7] 28:10 36:23 114:8 120:19 146:13,22 183:16 fairly [2] 27:21 28:11 fall [4] 198:21,22 207:24 208:1 falls [1] 80:21 familiar [9] 9:23 156:11 212:13 fan [1] 53:7 FAPR [1] 1:24 far [5] 80:20 128:24 149:25 150:13 170:10 fascinating [1] 203:25 faulty [1] 147:14 favor [4] 48:9 175:12 184:6 208:11 FCC [2] 55:22 97:25 feature [2] 80:25 110:13 featured [1] 115:16 features [1] 112:24 February [2] 1:18 224:20</p>	<p>FEDER [5] 1:11 7:11 19:22 224:11, 13 Federal [3] 39:6 58:15 97:24 fee [17] 44:3,7,15 54:25 146:11 170:7,12,16,19 171:15,16,17,19, 23 173:25 194:19 213:15 fees [6] 6:14 43:13,16 49:11,12 117:12 213:18,19 felt [2] 26:23 183:10 few [7] 96:24 109:4 173:2 180:14, 16 187:3 211:6 fifth [1] 22:4 fighting [1] 155:3 fight [1] 86:14 figure [6] 19:21 65:15,16 202:11 217:4 222:23 figuring [1] 213:20 file [5] 9:9 20:4 138:21 219:8 220: 16 filed [17] 9:3 11:10 12:12 13:13 25: 2 26:13,20 41:6 101:4,11 190:6 218:11 219:4,5,21 220:1 221:25 filing [7] 8:19 12:10 89:16 101:11 162:12 163:20 186:11 fill [1] 216:15 filled [1] 113:21 film [1] 118:2 filmmaker [1] 106:15 filter [1] 175:17 final [12] 41:16 53:17 67:19 76:1 87:25 92:1 101:21 103:2 161:3 177:10 212:12 216:3 finally [13] 77:4 92:1 95:11 96:7 100:14 102:19 116:19 129:13 135: 12 137:7 143:4 173:10 212:12 financial [1] 12:21 find [8] 8:4 66:7,8 67:15 71:17 93: 11 114:5 200:16 finding [1] 66:10 findings [1] 12:11 finds [1] 209:7 fine [1] 61:9 fine-tune [1] 137:23 fingers [1] 19:11 finish [2] 76:14 183:22 firm [11] 16:1,19 17:17,19 18:1,12 37:4 40:1 70:22 77:12 210:3 first [44] 25:15 29:2 30:8 32:11,13 34:3 36:13 40:18 42:9 57:5 69:5,6 72:9 73:11 76:12 78:10 84:11 85: 3 87:7 89:11 93:4,23 96:8 98:16 100:16 107:8 109:24 117:5 160: 18 161:11,21 163:22 164:19 168: 14 180:7,24 181:6 182:24 188:8 189:13 196:9,21 201:13 205:10 first-tier [1] 140:21 fit [2] 79:23 115:8 fits [4] 155:25 193:8,9,25 five [3] 31:22 33:15 51:19 85:1 134: 5 fixed [6] 41:18 52:12 200:5,6 203: 6 208:9</p>	<p>flawed [1] 36:1 flaws [9] 36:2 62:20 63:5 100:19 102:9 147:12 209:9 210:12 215: 19 flip [1] 115:2 Floor [2] 3:9 147:23 flow [2] 20:22 194:2 focal [1] 153:24 focus [13] 11:5 40:23 42:13 46:3 63:4 112:6 128:5,9 165:18,19 174: 24 182:15 197:8 focused [5] 85:1 91:12 100:16 110:18 115:12 118:1 focuses [1] 105:17 focusing [1] 119:18 folks [2] 63:17 72:19 follow [9] 13:3 54:9 55:11,13 86:6 181:10,11 223:23 224:5 follow-up [1] 25:11 followed [3] 55:12 124:10,15 following [4] 198:18 207:8 208:18 209:20 Football [1] 15:18 forces [1] 143:25 Ford [2] 142:4 209:18 Ford/Ringold [1] 142:11 foregoing [1] 226:3 foreshadowed [1] 96:23 form [8] 8:15 39:22 40:6,8 143:7 155:21 format [1] 159:8 former [1] 55:22 formerly [1] 93:8 forming [1] 91:25 forms [3] 49:19 150:11 210:6 formula [3] 155:13 161:15,18 formulas [2] 161:6 173:12 forth [7] 22:9 23:8 30:17 39:4 181: 21,22 184:6 Forthcoming [1] 222:11 forum [1] 183:8 forward [3] 14:10 105:11 126:16 fought [1] 32:13 found [10] 53:24 57:11 61:1,23 72: 19 87:8 90:9 91:9 198:17 220:5 foundations [1] 214:23 founder [3] 205:11 207:10 212:15 four [11] 37:5 71:24 94:4 99:11 100:23 128:22 129:17 134:20 144: 2 150:7 153:10 four-year [1] 146:22 fraction [1] 171:4 frame [1] 208:12 framed [1] 186:18 framework [1] 139:8 Frankel [3] 206:17,18,21 207:4,8 Frankel's [1] 206:24 frankly [3] 36:7 48:18 59:16 fraught [1] 204:16 Frederick [1] 134:21 free [3] 36:19,22 59:12 French [2] 141:5 151:16</p>	<p>French-ancestry [1] 141:8 French-Canadian [1] 141:23 French-language [4] 141:2,12,16, 18 frequently [1] 144:13 friend [1] 152:9 friends [2] 67:6 75:1 front [2] 11:11 29:14 full [5] 8:21 106:13 141:21,21 215: 16 fully [1] 161:1 fun [1] 195:1 function [4] 154:25 157:25 174:10 187:8 functions [1] 173:25 fund [26] 30:23,23,24 31:5,6,7 32: 14 51:2 103:3,4,9 104:5,6 128:10, 15 21:12 129:4,8,12,16 130:2,14 151: 8 157:14,16,19 fundamental [4] 83:15 89:3 216: 16 217:3 FUNDS [9] 1:7 6:22 102:22,23 128: 10,16 154:16 155:3 213:9 further [11] 45:24 88:2 92:18 94: 24 130:4 170:2 179:17 194:15 198:9 202:15 213:22 future [3] 22:24 61:3 171:7</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>game [4] 71:13 154:19,20 196:25 games [2] 79:7 80:19 gardening [1] 115:17 GARRETT [54] 2:3 14:25 15:1,10, 20,22 20:10,15 28:14,16,19 29:12, 15,20,25 30:5,6 32:8 34:2 60:11, 15,21 67:23 68:1,6 76:6,7 84:25 85:6,13,25 86:5 87:4 89:9,25 90: 15 92:10 94:15 103:14,22 105:9 153:8,13 154:5 155:10 159:6 170: 6 184:4 215:25 223:13,16,22 224: 1 225:3 Garrett's [2] 95:4 145:4 Garrison [2] 22:4 33:5 Gary [1] 209:18 GASANBEKOVA [2] 3:6 18:16 Gaston [2] 4:10 17:9 gather [2] 109:10 150:4 gathering [2] 22:11 26:6 gathers [1] 138:17 gave [7] 57:14 87:17 112:12,14 158:23 166:7 202:8 gee [1] 25:18 general [3] 15:15 16:24 47:14 53: 8 158:1 168:4 198:14 209:1 Generally [3] 31:22 52:10 145:22 generated [5] 43:13,15 49:11,12 123:19 generating [1] 43:24 generation [9] 44:4,7,15 55:1 170: 7,12,17,19 171:16 generic [1] 185:5 genres [4] 106:14 112:6 185:7,14 George [3] 134:25 136:6 138:25</p>
--	---	--	--

<p>145:24 146:24 151:3 173:17 213:14</p> <p>George's [8] 138:12 139:4,22 142:13 144:21 150:18,20 151:6</p> <p>Georgia [1] 7:24</p> <p>gets [5] 66:18 161:1 171:21 195:7 216:20</p> <p>getting [4] 28:9,15 144:20 148:25</p> <p>giant [1] 99:13</p> <p>give [23] 10:9 30:9 32:4 58:6,9 60:5 62:2,10 64:1,24 68:21 96:24 118:8 120:24 158:7 160:1,4 166:16 178:22 183:2,7 212:21 214:1</p> <p>given [10] 46:8 77:9 94:22,24 95:7 108:12 128:15 158:5 203:18 204:18</p> <p>gives [7] 120:25 134:2 155:14 159:12 164:18 166:14 178:2</p> <p>giving [4] 23:1 48:20 68:1 176:22</p> <p>global [3] 33:16,18,22</p> <p>goal [4] 163:13,14,15 175:16</p> <p>gold [1] 92:9</p> <p>Golf [2] 66:6 67:7</p> <p>got [17] 18:16 21:12 29:20 45:20 67:11 74:7 106:6,24 154:1 158:7 159:23 168:22,23 169:1 172:17,19 174:8</p> <p>gotten [2] 48:7 177:16</p> <p>government [1] 136:17</p> <p>Graduate [2] 135:8 156:17</p> <p>graph [1] 109:25</p> <p>Gray [47] 21:6,6 25:1,14,23 27:4,6,19,22 28:6 34:10 35:18 36:12 66:14 67:19 68:8 70:15,25 71:3,5,10,11 74:3,13,18 75:25 85:23 100:19 101:2,12 103:18 116:12 122:9 137:8 146:6,15 174:8 189:14 195:21,25 212:13,13,18,24 213:15,22 214:7</p> <p>Gray's [24] 22:20 23:22 24:9 25:7,9 27:25 36:6 68:12,14 73:5 75:13 95:24 102:2,15 129:13 135:14 145:17 147:9 150:17,21,22 213:6,10 220:24</p> <p>great [5] 32:16 105:20 201:4 204:5 223:10</p> <p>greater [9] 31:19 57:15 58:7 62:2 63:4 70:12 120:25 122:19,21</p> <p>Greg [1] 18:11</p> <p>GREGORY [4] 3:3 97:15 145:13 161:12</p> <p>grew [1] 17:20</p> <p>Griffin [1] 16:23</p> <p>gross [1] 83:12</p> <p>ground-breaking [1] 110:20</p> <p>grounded [1] 87:23</p> <p>groundhog [3] 59:25 60:8,17</p> <p>grounding [1] 53:20</p> <p>grounds [1] 190:12</p> <p>groundwork [1] 10:1</p> <p>Group [19] 4:2 17:5,8,10 37:1 77:1 82:10 105:5 122:2 132:7,10,13,22</p>	<p>152:12 160:6 166:19 210:2 212:4,16</p> <p>groups [4] 33:20 36:21 108:7 152:18</p> <p>grow [1] 16:5</p> <p>grown [4] 43:17 44:15 50:9 105:25</p> <p>growth [1] 106:2</p> <p>guess [2] 33:24 122:12</p> <p>guide [3] 10:25 39:5 203:18</p> <p>guides [1] 78:5</p> <p>guys [1] 52:2</p> <p style="text-align: center;">H</p> <p>hairstylists [1] 174:16</p> <p>half [8] 7:17 83:12 162:25 163:9,10 177:1,2 223:19</p> <p>Hamilton [5] 196:2 205:11,11,12,23</p> <p>Hamilton's [1] 206:3</p> <p>handful [1] 96:16</p> <p>handle [2] 10:14 46:2</p> <p>hands-down [1] 113:19</p> <p>happen [19] 18:21 20:2 28:4 48:25 60:12 112:1 191:9</p> <p>happening [2] 111:24 222:23</p> <p>Happy [5] 29:24 71:13 74:22 177:5 217:22</p> <p>hard [2] 16:6 93:22</p> <p>harken [1] 155:8</p> <p>harkens [1] 177:11</p> <p>Hartman [5] 33:4 51:11,21 52:18 206:12</p> <p>Harvard [1] 117:25</p> <p>Harvey [5] 22:4 33:5 74:6,16 75:9</p> <p>Hat [1] 113:5</p> <p>he'll [2] 160:3,5</p> <p>head [3] 165:25 201:16 206:1</p> <p>hear [12] 6:20 42:15 49:14 59:17 78:18 80:13 84:6 101:17 107:5 116:5 118:11 142:16</p> <p>heard [17] 71:16 105:2,9 134:11 137:10,19 140:9 143:20 145:15 147:12 148:8 187:1 190:12,13,17,19,23</p> <p>hearing [25] 6:13,19 7:5,15,22 8:4,5,11,16,17 9:1,19 10:9 11:5 12:6,17 13:7,18,20 14:3 15:7 25:4 32:13 88:12 224:19</p> <p>heart [3] 156:9 157:22 196:19</p> <p>hearts [1] 113:1</p> <p>heavily [1] 35:19</p> <p>heavy [1] 87:17</p> <p>held [1] 32:13</p> <p>help [4] 35:22 104:12 113:13 138:10</p> <p>helped [1] 57:12</p> <p>helpful [2] 27:12 61:2</p> <p>helps [4] 58:6 109:7,10 142:11</p> <p>hesitate [1] 70:17</p> <p>heterogeneity [1] 214:11</p> <p>heuristic [1] 189:20</p> <p>heyday [1] 43:25</p> <p>high [4] 80:19 92:19 141:10 151:5</p>	<p>higher [5] 100:11 129:11 144:20 146:3 151:24</p> <p>highest [5] 62:13 110:23 111:8 146:21 206:1</p> <p>highlights [2] 110:25 113:8</p> <p>highly [2] 52:24 56:17</p> <p>himself [2] 9:16 149:9</p> <p>hint [1] 162:16</p> <p>historical [2] 110:15 120:24</p> <p>Historically [1] 30:22</p> <p>history [12] 78:14 87:2 106:12,19 110:15 111:9 112:7,12,12 150:1,2 197:12</p> <p>hit [1] 75:3</p> <p>hold [2] 6:8 219:18</p> <p>holiday [2] 19:10 224:7</p> <p>HOLMES [1] 3:4</p> <p>home [5] 82:11 83:24 99:22 115:16 178:14</p> <p>homogeneity [1] 91:14</p> <p>hone [1] 196:16</p> <p>Honor [35] 15:1,11,22 16:1 17:7,17 18:8 20:15,19 23:3,4 26:11 28:12,17 29:12,16 32:9 39:9 68:7 104:21 119:22 132:5,8 180:2 183:9,17 184:24 191:25 192:18 214:1,4 220:21 223:8,13 224:2</p> <p>HONORABLE [3] 1:10,11,12</p> <p>Honors [12] 16:18 18:11 30:5 33:8 55:9 76:24 104:24 111:6 152:7 180:14 185:24 217:21</p> <p>hope [5] 20:3 21:17 82:15 104:9 204:24</p> <p>hopefully [2] 160:1 180:21</p> <p>hoping [2] 178:1 195:17</p> <p>Horowitz [48] 34:9 35:18,24 36:4 60:22 61:10,19 62:14,19,22 64:1 65:13,20 75:24 116:16 125:17,20,22 126:1,5,10 127:15 129:2 130:4 142:25 150:15 164:1,6 196:22 198:10,11 204:1,7 206:23 207:9,11,15,15 208:4,18 209:6,7 210:18 211:2 214:22 215:12,20,23</p> <p>Horowitz' [1] 203:23</p> <p>horse [3] 64:19,20 95:3</p> <p>host [1] 215:4</p> <p>hosted [1] 19:22</p> <p>hot [1] 132:12</p> <p>hour [5] 29:17 64:21 71:12 130:18 183:19 223:19</p> <p>hourly [1] 154:25</p> <p>hours [17] 29:5 64:15,16,17 69:10,13,14,23 74:5,8,9 155:17 174:11,12,13,18,22</p> <p>House [1] 109:2</p> <p>household [5] 69:13 71:12 95:15,17,22</p> <p>households [2] 71:9 212:10</p> <p>housekeeping [1] 18:21</p> <p>hovering [1] 179:4</p> <p>However [10] 19:24 21:8 24:5 26:25 36:1 87:12 103:4 187:5 215:7,</p>	<p>14</p> <p>huge [2] 93:16 165:2</p> <p>human [1] 81:3</p> <p>hundreds [3] 38:17 108:14 208:23</p> <p>Hunter [2] 112:11 135:1</p> <p>HUNZIKER [2] 3:16 16:21</p> <p>hypothetical [12] 168:16 187:7,19 189:2,20 191:22 192:11 193:23 195:23 196:4 206:7 214:18</p> <p style="text-align: center;">I</p> <p>IAIN [2] 2:13 15:12</p> <p>Ice [1] 112:12</p> <p>Ideally [1] 177:25</p> <p>identical [1] 164:7</p> <p>identification [1] 80:10</p> <p>identified [4] 165:23 207:7,18 222:10</p> <p>identifier [1] 81:7</p> <p>identifies [1] 46:15</p> <p>identify [8] 14:19 30:12 32:19 78:19 152:19,23 164:25 165:13</p> <p>identity [5] 81:19,19,24 108:23 136:15</p> <p>ignores [1] 95:21</p> <p>ignoring [1] 210:12</p> <p>II [7] 67:5 152:14 157:1 159:18 193:2,8 216:13</p> <p>illustrate [5] 86:7 94:19,25 101:22 102:11</p> <p>illustrated [2] 63:24 151:15</p> <p>illustrates [1] 84:4</p> <p>imagine [4] 23:15 39:8 59:11 182:5</p> <p>impact [2] 96:2 175:25</p> <p>implemented [1] 85:15</p> <p>implication [1] 174:4</p> <p>implications [1] 98:19</p> <p>importance [5] 157:13 170:17 199:10 213:25,25 214:10</p> <p>important [21] 24:25 41:9 45:18 49:20 62:16 67:9,78:15 79:18 87:9 111:23 123:7 137:12 140:10 159:2 169:1 172:10,13,15 182:15 187:15 201:21</p> <p>imported [3] 64:3 65:9,11</p> <p>importing [2] 65:23,24</p> <p>impose [1] 11:6</p> <p>impossible [1] 84:12</p> <p>imprecise [1] 78:1</p> <p>impressions [1] 176:20</p> <p>improper [1] 65:2</p> <p>improve [4] 42:3 60:4 94:6 148:7</p> <p>improved [3] 61:4 92:11 99:2</p> <p>improvement [1] 115:16</p> <p>improvements [3] 58:19 62:24 208:6</p> <p>in-depth [1] 113:22</p> <p>inaccurate [1] 149:3</p> <p>inadequacy [1] 74:3</p> <p>inadmissible [1] 179:9</p> <p>inappropriate [1] 89:4</p> <p>Inc [1] 207:11</p>
--	--	--	---

<p>incapable [1] 149:10 inception [1] 161:24 incidences [2] 143:19,21 include [13] 7:22 79:5 80:16 108:11,17,25 125:12 149:8 175:24 189:5 198:18 206:3 207:21 included [6] 54:23,25 83:9 175:5,7,9 includes [3] 51:15 108:8 205:15 including [8] 27:20 37:9 110:20 117:11 118:2,5 207:19 212:7 inclusive [1] 222:19 inconsistent [1] 11:8 incorporated [1] 39:15 increase [28] 31:16,25 47:23 48:10 49:6 104:3 110:5,7 116:1,16,17 119:5,6 120:1,17 121:13 122:11,20,21,24 123:3 124:25 125:18 127:23 129:19 140:1 143:24,25 increased [21] 47:20 105:22 106:5 114:18 116:7,10,15,20 118:16 121:25 122:15,17 127:3,6,8,12 137:3,5 138:2 145:7,8 increases [4] 53:4 121:12 140:4 143:9 increasing [2] 117:23 145:23 increasingly [1] 107:4 incredible [1] 9:25 Indeed [7] 7:15 52:8 61:22 71:10 92:3 189:18 Independence [1] 1:16 independent [11] 39:25 85:18 88:20 92:16 93:8 97:20,22 108:13 109:8 153:23 155:20 independently [1] 56:11 indicate [1] 155:24 indicated [8] 159:7 161:22 165:23 167:5 170:5 178:16 220:6 224:2 indicates [1] 31:3 indication [1] 45:7 individual [3] 103:19,20 195:9 individuals [2] 156:10 159:17 indulgence [1] 214:6 industries [2] 37:5 97:19 industry [11] 40:3 51:9 88:5 93:6 96:19,20 98:7 99:17 114:21 117:11 205:14 inexpensive [1] 112:18 inexplicably [1] 95:13 inflating [1] 45:11 influential [1] 175:6 infomercial [1] 174:16 infomercials [3] 46:21 79:8 174:17 information [22] 12:22 13:5,9 27:23 28:5 43:12 69:1,4 91:5 94:2 98:24,25 134:1 137:22 138:3,17 143:3,19 204:7 206:20 211:12 212:5 inherent [1] 210:12 initial [2] 161:7 189:19 initially [4] 34:16 157:23 162:12 209:22</p>	<p>input [2] 120:16,17 inputs [7] 74:18,18 99:14 121:3,4,8,9 insert [3] 191:17,24 192:3 inserted [1] 166:2 inserting [1] 192:13 instance [2] 118:19 179:1 instances [4] 118:18,24 119:3,5 instead [8] 86:7 93:14 95:17 106:10 112:9 166:21 193:24 198:22 instruction [1] 63:10 instructions [2] 124:11,16 integration [1] 188:25 intellectual [2] 118:1 210:6 intend [7] 118:8 140:1 187:21 193:24 199:25 200:14 203:14 intended [8] 29:10 41:21 58:19 73:16,18 74:11 143:4 218:20 intends [1] 27:20 intensity [1] 127:7 intentional [1] 211:18 interest [1] 81:3 interested [2] 87:14 216:8 interesting [4] 100:23 141:1 164:4 170:4 interestingly [1] 163:20 interests [2] 77:15,17 international [1] 210:3 Internet [2] 218:21 220:4 interrupt [2] 20:21 183:1 intervals [3] 54:3 91:2 92:20 interview [1] 198:3 interviewed [1] 46:7 interviewer [7] 40:19 199:25 200:14 202:8 203:13,16,18 interviewing [2] 40:2 55:3 interviews [4] 39:25 47:3 202:16,22 intrepid [1] 9:22 intrigued [1] 164:16 introduce [2] 14:20 156:4 introduced [8] 9:16 57:3 99:19 177:13 188:22 208:10 introduction [2] 58:16 61:10 intuition [1] 163:2 invalid [1] 203:21 invite [1] 82:14 involved [3] 38:8 150:9 211:25 involves [1] 150:6 IPG [1] 67:6 irrelevant [1] 214:11 Island [1] 112:15 isn't [2] 6:9 98:19 isolate [1] 165:12 isolated [3] 69:24 164:20,22 Israel [25] 33:5 34:4 35:14,21 50:6 55:20,24 56:20 57:1,22 68:23 70:1 116:22 126:12 127:10 129:6 136:9 137:8 146:14 147:3 150:17 173:16 210:9 213:14,16 Israel's [9] 69:3 139:5 145:5,15 146:18,25 150:18 213:23 214:8</p>	<p>issue [31] 13:2 23:5,13 24:4 27:7 39:1 41:22 44:4,19 50:25 63:9 73:24 82:11 128:23 147:4 160:23 166:13 168:3 172:25 175:8 177:23 179:4 180:24 182:17 188:12 198:9 200:16,25 203:24 209:3 213:5 issues [14] 7:5 12:18 37:9 42:4 55:1 58:20 70:14 96:20 102:15 109:24 174:9 180:22 203:4 207:6 iteration [1] 22:19 itself [14] 73:7 80:8 81:7 94:6 96:6 109:7 110:11 181:1 188:20 190:18,19,24 199:17 200:17 IV [1] 118:5</p> <p style="text-align: center;">J</p> <p>James [1] 38:6 January [2] 51:22 72:14 Jeffrey [2] 122:9 209:21 JESSE [2] 1:11 7:11 JESSICA [2] 5:5 18:1 jettisoned [1] 61:8 job [2] 82:22 84:8 Joel [1] 208:18 JOHN [8] 2:19 16:1 76:24 159:17 168:13,20 170:1 205:2 Joint [27] 2:2 14:24 15:2 20:12 22:6 27:24 30:4,7,11 31:3,12 33:23 36:25 38:10 47:19 48:14 52:23 85:4 89:20 116:21 118:10 129:5 133:11 206:13 208:2 209:17 210:10 Jonda [3] 100:3 134:11 205:2 joy [1] 21:21 JR [3] 2:19 3:14,16 JSC [21] 34:2 45:13 53:2 56:16,21,24 62:7,8 64:11 66:21 69:9,21 76:1 144:14 145:16 147:25 148:4,25 198:1 208:11 213:13 JSC's [1] 207:2 JUDGE [101] 6:3 7:8,10,11,12 15:8,19,23 16:8,11,15,25 17:4,14,22 18:4,9,19 19:22 20:3,17 21:23 22:13,19,22 26:8 27:17 28:13,18 29:8,13,18,23 32:6 60:7,13 67:21,25 68:3 76:5,8,19 78:9 104:14,17 119:12,15 120:3,8,15,23 122:13 128:8 130:16,22,25 132:3 135:15,18 148:14 152:2 153:2 156:8 174:20 178:9 179:22,25 180:6,11 182:25 183:6,13,18,21 191:21 192:6,9,19 195:20 211:19 217:24 218:2 219:1,4,8,17,21 220:6,11,14,19 222:7 223:9,14,20,25 224:6,11,12,13,15 JUDGES [44] 1:1 6:24 8:23 11:1,4 12:9,15,19 13:17 26:1,14 29:6 30:22 32:4 45:9 48:24 53:24 54:17 56:1 57:8,19 59:15 60:25 61:1,16 70:15 86:23 90:23 91:9 92:4 117:20 118:5,10 121:14 124:18 128:12,20 163:6 169:6 175:3 189:14,18 207:18 209:2</p>	<p>Judges' [7] 6:13 22:2 23:19 26:24 28:19 160:19 204:21 Judicial [3] 39:6 193:3,4 July [1] 202:17 jumble [1] 177:15 jump [2] 144:21 169:19 June [2] 114:20 211:15</p> <p style="text-align: center;">K</p> <p>Karen [3] 1:24 9:23 226:9 Kaye [1] 2:8 KCTS [1] 108:19 keep [4] 9:14 10:8 19:11,16 keeping [1] 29:19 Kelley [5] 107:7,9,11,18 110:11 Kelley's [3] 107:15 112:2 113:8 Ken [2] 33:10 106:15 KENDALL [4] 4:3 17:7 132:10 218:8 key [3] 41:16 184:13 214:16 Kids [1] 115:15 KIENTZLE [2] 2:6 15:5 killed [1] 86:21 Kim [1] 7:13 kind [16] 18:24 20:4 35:8,11 53:8 61:15 67:8 73:20 78:24 81:16,17 85:21 86:19,19 114:4 133:15 kinds [6] 62:23 79:8 80:15 91:19 96:21 216:19 Kirshenblatt [3] 134:8 135:20 140:6 knowing [1] 162:14 known [2] 152:12,14 knows [1] 18:25 Knupp [2] 3:8 18:12 KTLL [1] 172:13</p> <p style="text-align: center;">L</p> <p>LAANE [2] 2:4 15:4 label [1] 185:5 labels [1] 77:9 lack [2] 7:19 139:12 laid [1] 27:18 landscape [1] 111:18 lane [1] 184:3 language [2] 200:18 203:4 large [7] 82:5 133:22 134:17 156:22 213:17,23 214:8 larger [5] 24:3 66:4 125:18 132:19 149:13 largest [7] 51:14 130:6 132:21 188:1,4,10 205:24 Larson [2] 4:10 17:9 Last [39] 6:5 7:17 18:15 19:12 21:7 23:10 31:10 32:17 36:8 42:1 48:4 53:23 57:2,21,25 58:22 59:3 60:8 70:19 74:23 86:10 99:20 100:3 105:14,19 116:8 117:20 122:1 125:24 126:7 128:13,20 129:21 145:7 149:5 155:19 178:7 218:15 221:25 late [4] 80:24 153:3 181:1,7 later [2] 36:13 87:19</p>
--	---	---	--

<p>Laughter [18] 7:7 15:9 16:7,10 17:24 21:25 29:22 32:7 34:1 60:10, 20 68:5 82:18 111:5 148:13 153:4 184:9 211:21</p> <p>law [10] 12:11,14,16 16:19 77:12 153:17</p> <p>lay [1] 122:16</p> <p>layman [1] 66:2</p> <p>lays [1] 32:3</p> <p>lead [2] 14:18 153:14</p> <p>leader [1] 113:2</p> <p>leading [1] 114:19</p> <p>leads [1] 102:15</p> <p>League [2] 15:16,18</p> <p>leagues [1] 205:20</p> <p>learn [1] 89:19</p> <p>learned [1] 163:21</p> <p>learning [2] 112:7,13</p> <p>least [2] 11:11,12 20:6 33:25 35:13 57:1,19,21,25 58:2 62:4,8 69:12 98:17 104:4 155:16 180:18 188:6 192:1,1 202:19</p> <p>leave [4] 13:19 19:4,5 222:5</p> <p>led [1] 99:16</p> <p>left [7] 7:11 15:17 34:25 144:3 202:2 216:5</p> <p>legal [5] 134:16 139:8 147:4 183:2 193:5</p> <p>legally [1] 137:23</p> <p>legislation [1] 93:1</p> <p>less [12] 12:23 31:23 43:9 64:15 69:9 82:20 91:20 125:9 144:13 146:11 154:13 164:10</p> <p>lesser [1] 88:6</p> <p>level [2] 212:20 213:1</p> <p>leveled [1] 60:2</p> <p>leverage [1] 172:16</p> <p>Lexecon [1] 55:20</p> <p>Librarian [1] 54:11</p> <p>Librarian's [1] 88:18</p> <p>Library [4] 1:2,14 20:1 157:9</p> <p>license [11] 93:1,2 153:12,19 186:16 191:10,16 194:3 200:8 214:19 216:21</p> <p>licensed [2] 79:7 218:18</p> <p>licenses [1] 194:9</p> <p>licensing [5] 56:6 117:11 171:14 173:22 174:1 193:12 194:25 205:16</p> <p>life [1] 157:22</p> <p>life-long [1] 96:10</p> <p>light [2] 54:20 207:2</p> <p>likely [1] 206:5</p> <p>limit [2] 84:18 146:1</p> <p>limitations [1] 147:4</p> <p>limited [4] 87:15 113:24 133:19 218:24</p> <p>limits [1] 139:8</p> <p>Linda [3] 107:7 116:6 117:8</p> <p>Lindstrom [7] 74:4 116:12 122:5 211:11,14,22 212:5</p> <p>Lindstrom's [1] 211:12</p>	<p>line [10] 35:10 58:2 85:19 161:8 166:3 176:4,24 204:8</p> <p>lines [2] 103:14 112:8</p> <p>Lisa [3] 134:25 151:3 213:14</p> <p>list [15] 21:7,13 22:5 143:2 178:23 180:7 200:20,22 204:22 220:20 221:2 222:11,14,21 223:2</p> <p>listed [6] 32:20 65:7 183:19 205:3 222:10 223:1</p> <p>listen [1] 214:25</p> <p>literally [2] 153:11 158:5</p> <p>litigated [3] 31:10 37:19 38:3 45:9 53:23 54:7 57:2 59:3</p> <p>litigation [2] 78:5 181:22</p> <p>little [18] 12:22 31:20 36:12 48:16 57:15 65:3 69:9 70:18 89:18 112:21 133:3 146:3 158:10 161:20 173:10,11 207:9 218:4</p> <p>live [17] 33:3 46:16 53:6 62:15 80:22 107:16,17 134:5,10 159:15 177:5 198:18,21 205:4,5 207:25 214:14</p> <p>LLC [1] 205:12</p> <p>LLP [3] 2:8,14,22 3:8,17 4:10,18 5:6</p> <p>local [18] 43:8 44:23 79:13,14,16 81:2 82:2,7 83:10 133:6 157:21 172:10,11,18 189:7 194:11 216:24,25</p> <p>location [1] 170:7</p> <p>locations [1] 99:24</p> <p>logic [1] 166:11</p> <p>logjam [1] 154:15</p> <p>logs [1] 138:21</p> <p>Long [7] 112:15 150:1,2 153:15 154:6 155:4 163:23</p> <p>longer [4] 43:24 81:13 174:19 211:24</p> <p>look [36] 26:1 33:24 43:3 46:11 54:13 65:25 67:3 69:17 87:4,7 89:21 105:7,10,13 111:23 119:25 122:14 143:8,18 144:2 146:13 167:9 170:22 171:1 187:6,9,10 191:8 194:2 195:4,5 197:12 199:8 202:5 210:23 211:3</p> <p>looked [3] 54:20 68:24 121:15</p> <p>looking [3] 32:8 85:25 98:1 102:11 130:4 145:2 150:16 194:23</p> <p>looks [4] 66:15,15 136:10 194:5</p> <p>Los [1] 4:11</p> <p>lose [2] 53:16 169:23</p> <p>lost [1] 216:20</p> <p>lot [5] 46:21 65:23 126:24 178:17 211:24</p> <p>lots [4] 83:9 94:5 173:20 174:9</p> <p>Loughery [1] 15:18</p> <p>Louisiana [1] 141:9</p> <p>low [1] 144:15</p> <p>lower [1] 90:20</p> <p>lowest [1] 128:24</p> <p>loyalty [1] 113:1</p> <p>lucky [1] 211:20</p>	<p>LUCY [2] 3:4 18:13</p> <p>lunch [3] 76:11 131:2 157:6</p> <p>LUTZKER [21] 4:16,18,18 17:16,17,18,18,25 18:2,2,5 152:3,6,7 153:5 174:21 178:10 184:3 198:8 215:25 225:7</p> <p>Lutzker's [1] 197:18</p> <p style="text-align: center;">M</p> <p>ma'am [1] 76:7</p> <p>MACE [2] 2:21 16:3</p> <p>MacLEAN [27] 5:3 17:20 20:19,20 21:24 22:1,18,21 23:3 26:9 27:3,18 28:3,9 152:22 154:20 179:2,24 180:1,2,10 183:2,11 218:2 220:19,21 223:8</p> <p>MacLean's [1] 177:11</p> <p>made [25] 22:25 29:9 31:10 32:16 36:1 40:21 42:11 44:18 45:25 48:19 54:22 59:18 60:4 62:24 73:8 90:3 93:16 99:12 101:22 119:7 147:16 163:3 197:14 208:13 218:17</p> <p>Madison [2] 1:15 18:22</p> <p>magazine [2] 185:18,19</p> <p>magic [1] 178:24</p> <p>main [1] 168:9</p> <p>mainly [1] 75:4</p> <p>maintain [2] 13:4 14:12</p> <p>Major [4] 15:16 23:13 30:15 133:22</p> <p>majority [3] 109:5 167:18 185:21</p> <p>manage [1] 8:3</p> <p>manages [2] 8:4 106:16</p> <p>managing [4] 7:22 38:7 209:21 210:1</p> <p>mandated [1] 136:17</p> <p>many [28] 7:2 32:12 37:7 38:25 39:10 44:5,5 62:2 80:5 86:10,15,16,18 93:19 95:15 99:20 101:25 112:15 115:19 152:12 157:9 158:12 165:24 166:1 172:10 177:21 192:22 198:12</p> <p>map [1] 141:6</p> <p>maps [1] 99:23</p> <p>Marci [2] 96:8,9</p> <p>marginal [1] 189:23</p> <p>marginally [1] 61:1</p> <p>mark [9] 9:14 33:5 218:23</p> <p>marked [5] 13:11 54:4 178:17 179:8 223:7</p> <p>MARKED/RECEIVED [1] 225:16</p> <p>market [59] 7:24 37:3 40:1 57:11 79:14,14,16 83:25 91:11 99:22 116:22 135:23 137:11 138:9 145:12,19 150:5 172:17,19 186:17 187:8,9,10,12,12 189:2,3,3,16 191:6,9,18,19,22,23 192:11 193:10 194:5,6,7,11,13,14 195:4,5,24 196:3,4 199:25 200:10 203:8 206:7,9 207:12 209:11 213:7 215:3 216:25 217:2</p> <p>Marketing [1] 208:20</p>	<p>marketplace [53] 36:19,23 37:11,13,16 42:7,8 45:21 49:22,23,24 50:1,3 52:23 57:13 58:21 59:1 66:4,12,13 67:15 70:11 88:14 105:4 107:3,22 111:25 112:22 115:24 136:6 138:10 139:6 148:2 168:17 169:25 172:23 174:7 186:11,13,23 187:7,20,24 188:15,18 192:16 193:23 194:2 209:3,14 213:17 214:18 216:20</p> <p>markets [5] 90:4 97:18 102:13,14 133:23</p> <p>marks [1] 6:11</p> <p>Martin [4] 100:4 134:11 205:3 206:17</p> <p>Maryland [1] 38:19</p> <p>Massachusetts [1] 2:9</p> <p>massive [2] 99:7 150:10</p> <p>matched [2] 54:15 112:25</p> <p>material [3] 14:7 166:4 207:3</p> <p>materials [1] 12:25</p> <p>math [2] 113:14 154:21</p> <p>mathematical [1] 70:22</p> <p>Mathiowetz [13] 32:23,25 33:4 38:6,16 39:13 42:10 62:18 63:3 64:25 65:19 209:17 224:3</p> <p>Matt [1] 135:12</p> <p>MATTER [10] 1:4 6:18 14:17 18:21 20:23 113:15 149:5 191:1 219:22 221:22</p> <p>MATTHEW [3] 5:3 17:19 20:20</p> <p>maximize [1] 189:24</p> <p>maximum [1] 199:18</p> <p>McGill [1] 135:15</p> <p>McLaughlin [12] 107:7 116:6 117:8,9,14 118:9,15 121:8 124:4 125:1,6 129:22</p> <p>McLaughlin's [2] 117:21 124:19</p> <p>McLean [1] 20:18</p> <p>McLean's [1] 70:17</p> <p>McPHIE [3] 2:13 15:12,13</p> <p>mean [15] 22:10 24:20 64:22 65:10 75:12 106:10 121:6 151:1 153:10 154:23 194:4 200:19,19 203:22 205:13</p> <p>meaning [1] 140:20</p> <p>meaningful [2] 163:11 169:21</p> <p>means [5] 53:15 82:1 88:21 109:15 172:21</p> <p>meant [3] 10:25 64:10 120:16</p> <p>Meanwhile [1] 220:16</p> <p>measurable [2] 91:10 189:15</p> <p>measure [21] 69:11 70:16 88:4 89:5 92:17 95:19,24 98:12 102:7 105:24 106:3 116:2 120:14 121:23 122:15 143:22 145:1 161:9 173:18 174:2,22</p> <p>measured [1] 149:11</p> <p>measurement [1] 101:24</p> <p>measures [9] 102:17 110:6 117:4 119:25 120:1 121:16 129:18 173:24 185:1</p>
---	---	---	--

measuring [2] 174:5,5 mechanically [1] 54:17 Media [10] 36:25 38:12 117:10 134:16 159:19,20 168:20 205:12,19 212:4 medicine [1] 110:15 medium [1] 49:19 meet [3] 39:4 58:15 79:13 meets [1] 39:2 Mellis [1] 15:15 member [7] 108:17 109:7,16,20 132:21 154:6 184:19 members [5] 77:22 82:10 109:6,13 184:22 memorandum [1] 30:21 memory [1] 184:3 mentioned [7] 55:17 89:25 128:8 138:13 151:9 179:2 215:5 mere [2] 122:21 193:16 merely [2] 187:17 188:23 messages [1] 158:4 messy [1] 177:23 met [2] 9:16,21 meter [5] 73:12,17 74:11 102:2,5 method [2] 61:20 149:22 methodological [2] 56:13 62:1 methodologies [7] 156:18 160:5,10 187:6,11 192:22 195:19 methodology [35] 25:10 38:5,13 39:19 41:24 48:19 51:6 61:4,14,16 62:4,23 72:16,23 73:4 128:19 129:1 130:2 147:14 159:9,10 186:22 188:5,21 189:12 190:8,11,25 191:1 193:16,17 214:17,18 215:12 217:9 metric [4] 91:10 118:18 188:14 189:16 Metropolitan [1] 109:2 MICHAEL [2] 2:6 5:4 15:5,15 18:1 107:6,9 110:11 Michelle [2] 55:21 210:9 Michigan [3] 38:20 134:22,23 mid-day [1] 80:24 mid-morning [1] 168:10 might [13] 9:18,18 11:7,13 23:14 24:8 39:8 139:16 146:12 162:16 216:2 222:6,25 migration [4] 49:17,25 50:25,25 Mike [1] 157:6 miles [2] 84:3 99:22 million [5] 42:19,21 71:8 74:5 171:11 millions [1] 73:23 mind [4] 14:11 109:23 173:12 197:7 mind-numbing [1] 106:22 minimis [1] 67:17 minimum [2] 146:11 171:14,17,19,23 197:25 miniscule [1] 67:1 minor [1] 159:11 minute [7] 6:5 66:19 109:3 123:6	138:22 154:25 155:16 minutes [14] 67:24 76:16 82:20 95:15,18 131:1 145:3,6 156:3 173:19 178:13 179:19 201:1 202:14 mired [1] 193:20 mirror [1] 176:25 mirroring [1] 75:6 misclassification [1] 147:2 misleading [2] 170:20,22 misled [1] 65:21 misplaced [1] 214:3 misremember [1] 60:13 missing [1] 25:2 Mitchell [2] 3:8 18:12 mix [5] 56:7 79:2 106:13 132:19 133:3 mixed [1] 133:7 mode [1] 101:6 models [3] 139:7 147:16 207:16 Modern [1] 6:10 modest [2] 158:9 166:22 modified [2] 93:1,2 modifying [1] 207:19 moment [7] 55:16 58:8 83:19 117:5 128:5 144:22 204:7 Monday [2] 19:9 224:7 money [2] 158:2 170:8,14 171:10 172:2 195:3 monthly [1] 138:21 months [1] 71:24 Moreover [1] 95:21 Moring [2] 2:22 16:2 morning [26] 6:3 10:11 14:25 15:25 16:18 17:6,16 18:7,11 19:9,11 30:8,25 76:23 80:23 104:24 105:2,10 135:25 137:20 168:10 177:13 179:3 180:8 183:12 224:18 most [43] 7:3 9:24 35:19 40:19 42:17 43:7 53:25 54:4 56:17 62:9,16,16 69:6 80:20 81:10 87:9 93:12 100:18 109:16 110:13 111:8 116:20 123:11 140:7 147:16 150:23 160:14 162:7 168:23 169:1 181:11 182:6 185:1 186:22,25 187:22,23 191:5,5 202:16,19 203:25 215:2 motion [12] 11:12,16 21:3,8 22:3 101:16 178:5 184:20,23 221:13,19 222:24 motions [2] 11:15 20:25 motivated [1] 88:25 mouthful [1] 125:13 move [2] 90:1 205:7 movie [4] 60:7,14 132:14 199:1 movies [4] 46:22 64:9 185:5,20 moving [2] 112:4 153:21 MPAA [7] 21:6 23:8 25:1 26:1 27:6 96:5 221:25 MPAA's [2] 24:9 25:21 MPM [1] 74:20 Ms [42] 7:13,21 9:23 10:8,12 15:16 26:10,11 28:12 96:9,18 100:1 101:	23 117:9,14,21 118:9,15 121:8 124:4,19 125:1,6 129:22 135:20,20 141:7 177:20 178:16,24 180:8,16 184:7,8 196:2 205:2,2,11,11,23 206:3 212:1 MSO [1] 205:25 much [31] 7:15 10:8 30:1 32:14,14,20 39:13,14 41:18 42:1 46:2 59:7 61:22 65:12 69:17 78:2,23 91:19 102:7 106:5 125:18 127:12,19 137:21 138:1 163:6 180:19 182:2 195:11 208:16 215:20 multi-cast [2] 115:2,7,11,14,15,20 multi-casting [2] 114:20 115:4 multi-channel [1] 53:5 multi-station [1] 172:9 multichannel [1] 97:17 multiple [10] 21:12,12 51:19 53:11 74:15,17 75:5 98:14 212:19,25 multiplies [1] 95:18 music [5] 102:24 118:3 151:9 184:4 218:10 must [4] 12:19 35:11 124:1 171:15 must-have [3] 53:14 113:17,18 myself [1] 152:22 <hr/> N N.W [2] 2:9,15,23 3:9,19 4:5,19 5:7 NAB [1] 78:1 name [2] 16:19 17:7,17 18:15 76:24 104:25 134:11 152:11 Nancy [1] 38:6 narrow [1] 130:3 NASCAR [2] 65:14,15 nation's [1] 51:14 National [14] 15:18 39:6 73:17 74:10 77:12,14,22 81:2 102:2,5 109:12 132:20 169:4,10 nationally [4] 73:18 109:11 166:1,10 natural [2] 110:9 115:8 nature [9] 13:5 14:14 23:18 30:10 80:11 106:18 110:10 115:13 158:20 NBC [1] 202:10 NCAA [1] 15:13 near [2] 150:14 178:1 nearly [2] 118:16 185:13 necessarily [5] 52:11 80:11 165:2 184:22 201:24 necessary [1] 99:8 necessity [1] 24:3 need [15] 8:18 13:8,22 27:22,23 55:2 60:17 67:3 77:6 103:17 107:16 173:8 176:23 177:6 191:14 needed [3] 20:25 177:22 189:23 needs [3] 10:13 13:15 178:2 negative [2] 19:12 120:22 negotiate [1] 51:4 negotiating [3] 52:3,9 205:17 neither [2] 55:24 57:9 75:23 102:16 199:6 210:19 211:8,8 net [2] 102:24 151:9	network [7] 43:24 79:6 108:12 132:21 141:5,16 186:5 networks [2] 52:13,14 66:8,9 68:24 83:10 never [2] 59:19 71:25 73:15 196:15,19,19 new [16] 7:9 59:19 98:24 108:18 110:20 135:2 141:10,17 172:12,17 176:1 182:22,23 199:8 206:21 208:22 news [11] 46:13 80:25,25 81:1,5,6,21 110:16 115:12 133:4 185:18 newscasts [2] 80:22,23 81:4,13 168:9 169:5,12,13,14 next [29] 30:17 31:8 32:18 33:1,14 40:15 43:14,20 46:6 47:18 50:4,13 54:13 63:24 69:2 72:8 74:2,22 87:12,19 88:15 89:24 97:15 99:4 123:1 155:16 176:15 211:11 224:3 nicer [1] 184:5 niche [4] 88:8 91:18 140:10,12 Nielsen [19] 27:7 73:12,17 74:10 79:15 88:23 95:14,23 96:6 101:25 158:18 163:24 182:20 211:15 212:2,4,6,18,24 night [3] 23:11 80:24 221:25 nobody [2] 25:15 59:11 non-beards [1] 16:12 non-commercial [2] 108:4,9 non-compensability [5] 54:24 160:23 162:24 166:14 173:7 non-compensable [3] 45:16 165:21 168:11 non-network [2] 49:23 50:2 64:14 65:16 66:12 67:14 201:17 206:5 non-restricted [1] 219:10 non-super [2] 84:2 99:21 non-U.S [2] 132:14,24 nondisclosure [1] 13:19 none [2] 20:15 24:15 89:13 162:8 199:24 225:13 Nonetheless [4] 10:3 12:24 87:16 91:23 noon [3] 76:11,12,13 nor [2] 55:24 75:23 102:17 199:6 210:20 211:8 Normally [1] 14:3 norms [1] 40:4 northern [2] 133:21 139:9 Notably [1] 146:17 note [10] 15:6 33:8 35:7 45:18 47:25 48:13 49:3 70:9 74:22 184:2 noted [3] 45:10 56:20 106:15 notes [1] 226:5 nothing [3] 29:10 88:25 193:9 notion [2] 170:17 173:3 notions [2] 193:21 198:6 notwithstanding [2] 23:17 182:16 nowhere [1] 81:15 NPM [1] 102:13
---	--	--	---

<p>NPR [2] 102:24 151:9 number [21] 39:11 43:9 51:18 62:22 66:18,23 69:14 83:12 119:20 121:1,1 142:19 144:7 146:21 170:8 174:12,22 189:6 200:20,21 222:1 numbered [1] 222:15 numbers [15] 35:16,17,18 56:19 85:20 90:17,17 95:22 102:6 103:2 118:14 126:24 149:10 167:19 223:3 numerical [1] 162:5 numerous [1] 26:15 NYMAN [2] 5:5 18:1</p>	<p>omitted [1] 123:15 on/off [1] 6:9 once [6] 60:1 81:10 103:1 112:3 155:19 221:18 One [101] 3:18 8:18 10:4 11:12 12:5 14:5 15:10 16:5,9 18:21 19:13,19 29:16 32:14 33:25 34:22 36:15 41:9 42:13,25 43:11,19 44:3 45:25 46:6 48:12 53:17 55:8,19 58:6,12,24,24 63:5,7 64:20 67:10 68:21 70:13 71:12,12 72:18 86:13 89:25 92:3,25 95:6,18 98:13 101:14 105:6 114:15,24 118:9,10 208:7 122:2 123:6 127:1,14,21 133:1,17,25 135:15 140:22,24 142:23 146:8 147:1 155:13,21 156:5 157:5 165:3,15,15 166:3 167:6 168:2 175:21 176:9 177:10,18 178:7 183:19 185:4 186:13 187:23 191:7 192:12 194:1 199:9,10 208:7 209:22 212:21 214:18,19 216:2 218:8 one-on-one [1] 70:7 one-third [3] 115:6 118:17 127:7 ones [12] 11:14 35:3 63:13,14 75:14 90:20 99:7 123:13 159:8 221:12 222:9,22 only [75] 8:15 15:10 16:5 25:3 28:6 31:12 32:4,21 42:24 43:4 46:19 47:1 53:19 55:4,5 57:4 64:13 65:11 68:2,12 74:7,17 80:1 81:13,25 82:12,22 83:12 87:24 89:19 92:5 93:9,10 95:6 101:10 104:8 106:2 108:1,11 111:16 115:10 117:18 123:10,13,21 124:14 126:3 127:21,21 130:7 133:18,20 134:14 135:9 138:6 139:7 140:17 142:22 154:12,13 160:2 166:18,19 169:17 175:21 190:20,21 191:14 197:9,10 216:8 218:22 219:15,24,25 open [4] 13:7 189:3,3 194:2 opening [26] 10:19,25 11:8 13:23 15:21 16:14 17:1,13 18:3,18 20:11 28:25 29:3 30:3,9 76:13,21 104:18,22 132:6 145:4 152:4 177:12 183:24 187:2 225:2 Opera [1] 109:2 operate [1] 187:12 operated [1] 51:18 operating [1] 132:11 operation [1] 205:25 operator [24] 34:4,9,22 35:14,20,24 38:9 41:11,12,18 60:22 100:20 116:13 123:1 125:17,25 127:14 135:11 136:22 139:13 142:2,15 194:13 195:15 operators [54] 37:15 51:14,20 61:7,13 83:1 85:3,6 87:13,16 88:6 93:3 94:15 97:7 105:8 107:20 108:6 110:1 113:18,25 115:19 116:3 119:7 123:12,20 125:7,20 127:9,17,17 136:12,23 137:12 138:4</p>	<p>139:19 140:11,24 141:11 142:8,14 144:9 151:17 160:20 162:1 164:1,11 165:6 166:15,23 167:25 186:1 196:11 206:4,5 Opinion [1] 38:21 opinions [1] 97:22 opportunity [3] 12:13 134:3 178:15 opposed [6] 119:18 120:25 178:22 179:8 187:18 190:22 opposing [1] 8:24 options [1] 119:11 order [9] 10:20 11:20 12:24 13:2 14:23 32:20 156:9 176:12 199:15 ordinal [1] 176:12 organization [3] 111:11 138:17 209:24 organizations [1] 96:19 organize [3] 202:7,9,10 organized [1] 185:11 original [3] 33:9 72:13 141:3 originally [2] 75:7 219:12 originated [2] 136:19 138:24 other [133] 11:25 17:10 21:9 27:14,24 33:6,7 38:11 39:1 42:16,20,25 43:11 46:14 47:8 48:12 49:19 53:12 55:17 56:11 60:18 63:1,22 64:2,5,6,24 65:8,13,14,23 66:3,16,20 67:2,16 69:19,25 70:2 71:5 72:6,23 73:4,14 75:21 78:4 79:5,8 80:8,9 81:10,12 82:5,16 83:24 89:15 94:12 95:1 102:9,14 103:8 105:12 108:7,10,25 109:13,13 111:11,13 112:15,25 115:13 119:11 120:4 121:18 123:18 125:16 127:16 128:7,15 130:10 133:15 135:4 137:5 138:11 140:4 141:22 142:14 145:10,12 149:3 150:9 151:8,22 157:5 163:21 164:10 165:1,17 166:21 167:4,14 168:1,2 170:3 172:13 173:20 176:22 184:21 185:7,14 188:14 192:9 193:16 197:4,5 198:5,7,20 199:3 200:13 207:14,22,23 212:19,25 214:15 217:1 220:25 222:24 223:18 224:10 others [7] 12:23 16:9 31:21 68:15 111:7 156:7 160:25 otherwise [6] 14:7 22:7 46:21 86:25 171:24 176:23 ought [1] 44:9 ourselves [1] 152:24 out [42] 19:1,21 21:24 26:2,3 27:19 32:3,5,10 33:13 34:24 42:1,18 44:6 46:24 50:5 51:2 67:2 69:2 71:17 119:11 133:11 139:18 140:19 144:8 156:15 158:21 169:4,7,22 176:10,17 177:19 182:8,9 194:13 202:10,11 213:20 216:5 217:4 222:23 out-Bortz [1] 197:2 outage [2] 19:24 224:9 outcast [1] 158:4 outcome [1] 142:13</p>	<p>outlet [1] 111:13 outputs [1] 74:16 outside [3] 13:20 82:13 216:25 over [46] 14:14 18:23 19:2 31:16 32:13,17 37:5 38:3 41:25 42:19,22 44:24,25 47:25 50:18 51:12 52:3 58:21 61:24 69:20 83:17 86:10 103:24 108:16 116:17 119:10 122:16 128:22 129:16 140:1 142:5 144:18,24 145:7,23 146:4,17,22 147:6 153:8 155:3 158:8 180:2 183:23 210:16 224:9 over-sample [1] 102:14 over-the-air [1] 44:23 overall [3] 56:18 145:18 188:2 overcome [2] 147:20 209:8 override [1] 13:8 overriding [1] 200:25 overseeing [1] 97:13 overvalued [1] 198:19 own [15] 51:4 80:25 84:15 88:19 108:21 109:14 124:10 163:19,25 169:4,12,23 196:22 198:17 216:2 owned [1] 96:15 owner [7] 79:9 172:9,9 194:7 195:7,9,12 Owners [5] 45:19 79:5 185:16 186:4 195:1</p>
<p>O o'clock [1] 224:18 object [1] 222:6 objected [1] 23:14 objection [4] 29:2,6,9 205:9 objections [2] 23:17 222:25 objective [2] 184:25 187:22 observable [1] 57:13 observation [1] 53:17 observations [2] 93:20 175:6 observing [1] 14:6 obtain [1] 167:5 obviously [4] 79:18 88:11 154:2 159:11 occupied [1] 69:22 occur [1] 186:15 occurred [1] 202:17 off-line [1] 19:14 offense [1] 29:10 offer [10] 8:9 12:3 21:2 88:8 111:20 160:12 179:11,14 187:3 188:6 offered [10] 30:16 33:17 60:24 83:7 106:8 112:13,23 114:4 148:1 173:16 offering [2] 112:8 113:4 offers [1] 156:24 Office [6] 6:15 14:12 19:13 41:7 194:18,24 Officer [1] 207:11 offices [1] 14:4 official [1] 9:2 officially [1] 93:4 often [3] 81:4 88:8 106:20 Okay [19] 6:6 22:22 49:24 66:6 67:25 68:3 74:9 102:19 135:18 157:10 179:18 183:5,21 201:22 214:2,5 220:14 224:6,17 OLANIRAN [26] 3:3 18:6,7,10,11,20 178:13 179:23 180:12,13 182:25 183:5,9,16,20 184:1,10 191:25 192:8,17,20 195:25 211:22 217:25 218:1 225:8 old [3] 59:18 109:2 199:4 older [1] 63:21 oldies [1] 216:1 Olympics [1] 66:6 omission [1] 124:2 omits [2] 95:14 123:9</p>	<p>omitted [1] 123:15 on/off [1] 6:9 once [6] 60:1 81:10 103:1 112:3 155:19 221:18 One [101] 3:18 8:18 10:4 11:12 12:5 14:5 15:10 16:5,9 18:21 19:13,19 29:16 32:14 33:25 34:22 36:15 41:9 42:13,25 43:11,19 44:3 45:25 46:6 48:12 53:17 55:8,19 58:6,12,24,24 63:5,7 64:20 67:10 68:21 70:13 71:12,12 72:18 86:13 89:25 92:3,25 95:6,18 98:13 101:14 105:6 114:15,24 118:9,10 208:7 122:2 123:6 127:1,14,21 133:1,17,25 135:15 140:22,24 142:23 146:8 147:1 155:13,21 156:5 157:5 165:3,15,15 166:3 167:6 168:2 175:21 176:9 177:10,18 178:7 183:19 185:4 186:13 187:23 191:7 192:12 194:1 199:9,10 208:7 209:22 212:21 214:18,19 216:2 218:8 one-on-one [1] 70:7 one-third [3] 115:6 118:17 127:7 ones [12] 11:14 35:3 63:13,14 75:14 90:20 99:7 123:13 159:8 221:12 222:9,22 only [75] 8:15 15:10 16:5 25:3 28:6 31:12 32:4,21 42:24 43:4 46:19 47:1 53:19 55:4,5 57:4 64:13 65:11 68:2,12 74:7,17 80:1 81:13,25 82:12,22 83:12 87:24 89:19 92:5 93:9,10 95:6 101:10 104:8 106:2 108:1,11 111:16 115:10 117:18 123:10,13,21 124:14 126:3 127:21,21 130:7 133:18,20 134:14 135:9 138:6 139:7 140:17 142:22 154:12,13 160:2 166:18,19 169:17 175:21 190:20,21 191:14 197:9,10 216:8 218:22 219:15,24,25 open [4] 13:7 189:3,3 194:2 opening [26] 10:19,25 11:8 13:23 15:21 16:14 17:1,13 18:3,18 20:11 28:25 29:3 30:3,9 76:13,21 104:18,22 132:6 145:4 152:4 177:12 183:24 187:2 225:2 Opera [1] 109:2 operate [1] 187:12 operated [1] 51:18 operating [1] 132:11 operation [1] 205:25 operator [24] 34:4,9,22 35:14,20,24 38:9 41:11,12,18 60:22 100:20 116:13 123:1 125:17,25 127:14 135:11 136:22 139:13 142:2,15 194:13 195:15 operators [54] 37:15 51:14,20 61:7,13 83:1 85:3,6 87:13,16 88:6 93:3 94:15 97:7 105:8 107:20 108:6 110:1 113:18,25 115:19 116:3 119:7 123:12,20 125:7,20 127:9,17,17 136:12,23 137:12 138:4</p>	<p>139:19 140:11,24 141:11 142:8,14 144:9 151:17 160:20 162:1 164:1,11 165:6 166:15,23 167:25 186:1 196:11 206:4,5 Opinion [1] 38:21 opinions [1] 97:22 opportunity [3] 12:13 134:3 178:15 opposed [6] 119:18 120:25 178:22 179:8 187:18 190:22 opposing [1] 8:24 options [1] 119:11 order [9] 10:20 11:20 12:24 13:2 14:23 32:20 156:9 176:12 199:15 ordinal [1] 176:12 organization [3] 111:11 138:17 209:24 organizations [1] 96:19 organize [3] 202:7,9,10 organized [1] 185:11 original [3] 33:9 72:13 141:3 originally [2] 75:7 219:12 originated [2] 136:19 138:24 other [133] 11:25 17:10 21:9 27:14,24 33:6,7 38:11 39:1 42:16,20,25 43:11 46:14 47:8 48:12 49:19 53:12 55:17 56:11 60:18 63:1,22 64:2,5,6,24 65:8,13,14,23 66:3,16,20 67:2,16 69:19,25 70:2 71:5 72:6,23 73:4,14 75:21 78:4 79:5,8 80:8,9 81:10,12 82:5,16 83:24 89:15 94:12 95:1 102:9,14 103:8 105:12 108:7,10,25 109:13,13 111:11,13 112:15,25 115:13 119:11 120:4 121:18 123:18 125:16 127:16 128:7,15 130:10 133:15 135:4 137:5 138:11 140:4 141:22 142:14 145:10,12 149:3 150:9 151:8,22 157:5 163:21 164:10 165:1,17 166:21 167:4,14 168:1,2 170:3 172:13 173:20 176:22 184:21 185:7,14 188:14 192:9 193:16 197:4,5 198:5,7,20 199:3 200:13 207:14,22,23 212:19,25 214:15 217:1 220:25 222:24 223:18 224:10 others [7] 12:23 16:9 31:21 68:15 111:7 156:7 160:25 otherwise [6] 14:7 22:7 46:21 86:25 171:24 176:23 ought [1] 44:9 ourselves [1] 152:24 out [42] 19:1,21 21:24 26:2,3 27:19 32:3,5,10 33:13 34:24 42:1,18 44:6 46:24 50:5 51:2 67:2 69:2 71:17 119:11 133:11 139:18 140:19 144:8 156:15 158:21 169:4,7,22 176:10,17 177:19 182:8,9 194:13 202:10,11 213:20 216:5 217:4 222:23 out-Bortz [1] 197:2 outage [2] 19:24 224:9 outcast [1] 158:4 outcome [1] 142:13</p>	<p>P p.m [4] 131:2 132:2 179:21 224:19 Pacific's [1] 7:24 package [2] 107:1 111:21 page [4] 30:21 87:13 174:25 225:2 paid [9] 56:6 79:7 82:23 146:11 173:21 185:25 194:23 195:7 Panel [2] 118:3 119:22 paper [14] 7:25 8:3,15,18,25 9:4,6,10 10:15 33:7,13 134:6,19 135:10 papers [5] 100:6 156:6,13 183:14 214:3 paragraph [1] 88:2 parents [3] 113:1,7,17 parents' [1] 113:19 parlance [1] 196:24 part [20] 9:14 24:17 50:14 52:10 59:7 91:22 97:4 100:25 101:7 103:10,11 114:18 155:9 163:1,2 212:4 213:17 216:6 218:11 220:1 participant [3] 11:25 13:3 27:25 participants [2] 8:12 10:17 participate [3] 128:11 171:6,9 participated [2] 96:18 161:23 participation [2] 125:4,14 particular [17] 11:8,16 21:1 38:3 41:2,10 48:13 56:15 77:21 81:14 97:16 147:19 156:20 165:5,5 175:19 181:25 particularly [9] 42:13 47:3 63:6 107:21 141:1 173:8 176:13 198:15 207:2 parties [66] 7:2 11:7 12:1,9 13:5,11 31:13,18,22 33:6,12 35:7 37:8</p>

<p>38:2 42:6 48:12 59:14 68:14 73:14 75:21 84:14 89:15 100:8,23 103:8 105:12 107:14 128:8 130:6 137:5 145:10,20 148:9 149:13 151:22 155:15 159:7 160:11 162:1 163:18,22 164:4 171:5 177:21 178:17 181:2,8,11 184:15 185:10 186:8,10,12 187:2,3 190:10 193:7 197:21 205:1,6 215:24 219:14 220:22 222:6,25 223:18</p> <p>parties' [2] 13:8 110:6</p> <p>party [1] 85:13</p> <p>parts [1] 93:2</p> <p>party [6] 13:15 16:9 58:25 61:11 68:13 175:12</p> <p>party's [2] 124:4 128:25</p> <p>Pasadena [1] 4:12</p> <p>Pasquale [1] 205:2</p> <p>pass [1] 59:12</p> <p>passed [2] 88:16 202:20</p> <p>passionate [1] 53:7</p> <p>past [15] 38:10,20 45:9 58:20 59:18 69:12 70:4 75:17 76:12 121:4, 5 151:25 162:8 206:18 207:18</p> <p>patience [1] 10:4</p> <p>Patton [2] 2:14 15:12</p> <p>Paul [1] 122:5</p> <p>pause [1] 58:8</p> <p>pay [7] 93:4,12 170:14 171:15,18, 24 184:14</p> <p>paying [1] 138:1</p> <p>payments [2] 39:24 51:4</p> <p>pays [2] 79:9 194:18</p> <p>PBS [21] 106:16 107:10,24,25 108:17 109:4,6,7,10,16,19 110:18,23 111:10,12 112:25 113:19 114:11 133:13 188:4</p> <p>PBS' [1] 107:12</p> <p>PBS's [1] 113:9</p> <p>Peabody [1] 111:11</p> <p>pending [4] 20:24 21:3 101:15 222:24</p> <p>Pennsylvania [1] 2:23</p> <p>people [16] 29:21 52:5 73:12,17 74:11 102:2,5 151:8 154:1 157:9 164:11 165:5 169:19 172:7 184:4 216:15</p> <p>percent [101] 31:5,6,15,25 32:2,4, 16 35:6 40:4,8,13 42:22 43:4,10, 16,17 46:24,25 47:20,21,22 50:8,9, 12,12,18,21,23,23 56:22,23,24 64: 13 66:17 69:10,15,20,22,23 72:11, 24 74:8,8 84:1 99:20 103:1,2,9,24, 25 104:4 116:7,10,16,17 117:3 119:2,4,5 120:5,9,11,13 122:7,10, 11,16 124:17,23,25,25 125:22 126: 13,15,22,22 128:22 129:4,8,12,16, 25 130:13 136:20 139:24 143:13, 15 144:5,6,8 145:7 151:2 158:10, 10 162:23 166:8 171:3,3 177:1 217:14,20</p> <p>percentage [14] 31:15,23 32:9 48:</p>	<p>5 49:4,5 75:3 93:13 121:13 122: 20 127:24 136:18 144:12 164:17</p> <p>perfect [4] 88:4 190:24,25 191:2</p> <p>performance [1] 106:19</p> <p>perhaps [6] 12:22 63:23 160:25 181:17 188:13 190:20</p> <p>period [23] 42:2 50:21,22 77:21 83: 6 96:15 106:25 110:18,22 111:19 114:10 137:3,6 144:18,25 145:2, 23 146:5,9,17,23 152:14 158:25</p> <p>periodic [2] 18:23 19:20</p> <p>permission [1] 204:21</p> <p>permitted [1] 154:22</p> <p>person [2] 13:17 40:19</p> <p>personality-driven [1] 112:20</p> <p>Personally [2] 29:4 156:7</p> <p>perspective [20] 58:3 84:25 89:4, 5 92:9 97:10,11,12 98:5,11 103: 15 108:22 120:24 123:13 154:17 155:4 156:25 164:5 169:20 170: 16</p> <p>persuasive [4] 53:25 90:10 191:5 215:2</p> <p>phantom [1] 22:8</p> <p>Phase [28] 31:11,11 36:9 37:19 67: 5 90:24,25 91:8 92:3 152:14 157: 1,3 159:18 161:23 163:24 189:10, 11 190:5,7,21,22 193:1,1,2,2,8,9 216:4</p> <p>phases [1] 13:10</p> <p>phenomenon [1] 83:20</p> <p>Phoenix [1] 36:10</p> <p>photographs [1] 159:16</p> <p>photos [1] 156:9</p> <p>phrase [3] 152:21 186:24,25</p> <p>pick [2] 137:24 216:24</p> <p>picked [1] 47:24</p> <p>Picture [2] 184:20,23</p> <p>piece [6] 43:11 54:1 85:19 87:9 165:1,2</p> <p>Pillsbury [3] 5:6 17:19,25</p> <p>Pioneer [2] 96:13 115:5</p> <p>Pittman [1] 5:6</p> <p>pivotal [1] 53:3</p> <p>place [3] 110:9 173:14 217:6</p> <p>placed [1] 55:19</p> <p>plain [1] 29:9</p> <p>plan [1] 221:9</p> <p>planned [2] 33:9 223:18</p> <p>planner [1] 19:12</p> <p>play [3] 154:19,19 216:2</p> <p>played [2] 111:2 215:25</p> <p>playing [1] 176:21</p> <p>plays [1] 53:3</p> <p>plea [2] 14:3 178:7</p> <p>pleading [2] 26:13,13</p> <p>pleadings [1] 26:20</p> <p>pleasant [2] 48:6 184:1</p> <p>Please [11] 6:3 10:3 11:17 14:19 29:11 76:19 82:14 89:9,9 132:3 179:22</p> <p>pleased [1] 77:4</p>	<p>plenty [2] 60:18 169:14</p> <p>PLLC [1] 4:4</p> <p>PLOVNICK [9] 3:4 18:13 26:10,11 28:12 180:16 184:7,8 212:1</p> <p>plug [3] 176:1 201:25 202:12</p> <p>plugs [2] 168:11,11</p> <p>point [37] 21:18 22:12 25:13 26:1 31:15 32:9,10 44:6 47:23 49:6,20 59:18 70:3 76:9 80:6 84:16 87:22, 24 117:22 124:20 125:14 130:17 143:14 146:8 153:24 158:16 161: 13,16 162:22 164:8,9 174:21 177: 25 180:9 191:24 202:18 223:10</p> <p>pointed [1] 42:1</p> <p>points [10] 31:23 48:5 49:5 72:25 75:3 101:22 160:18 161:21 165: 17 172:8</p> <p>policies [1] 98:1</p> <p>polls [1] 114:10</p> <p>Pope [1] 16:22</p> <p>popular [1] 182:7</p> <p>population [1] 142:18</p> <p>Porter [3] 2:8 15:1,4</p> <p>portion [6] 10:18 34:18 83:14 133: 19,22 139:9</p> <p>position [4] 155:10 161:8 183:3 206:1</p> <p>positive [1] 130:8</p> <p>possible [1] 84:21</p> <p>possibly [3] 21:15 71:3,15</p> <p>post [2] 101:13 218:23</p> <p>post-game [1] 80:19</p> <p>post-regression [1] 74:24</p> <p>posted [3] 19:16 218:21 220:4</p> <p>pot [1] 34:25</p> <p>potential [3] 91:24 167:7 176:19</p> <p>potentially [1] 21:14</p> <p>power [4] 18:23 19:1,24 224:9</p> <p>power-back-up [1] 19:15</p> <p>power-offs [1] 19:20</p> <p>power-up [2] 19:8,10</p> <p>practicable [1] 11:15</p> <p>practical [1] 187:18</p> <p>pre [1] 74:23</p> <p>pre-game [1] 80:18</p> <p>pre-January [1] 101:12</p> <p>precedent [6] 23:20 26:24 53:21 55:15 75:22,23</p> <p>precedents [1] 86:6</p> <p>precise [1] 94:8</p> <p>precisely [1] 177:18</p> <p>precision [2] 94:6 99:2</p> <p>preclude [1] 28:24</p> <p>preclusion [1] 191:16</p> <p>predecessors [5] 42:6 55:12 57: 14,19,25</p> <p>predictably [1] 141:11</p> <p>predictor [1] 88:6</p> <p>predominant [3] 80:20 91:20 189: 19</p> <p>predominantly [1] 142:3</p> <p>prefer [2] 23:12 151:2</p>	<p>preferable [1] 209:8</p> <p>preference [1] 139:12</p> <p>preferences [1] 136:11</p> <p>prejudice [2] 181:1,8</p> <p>preliminary [1] 153:6</p> <p>premium [2] 165:13 177:3</p> <p>prepared [4] 8:25 118:12 153:7 163:12</p> <p>prescribed [1] 194:19</p> <p>presence [1] 67:16</p> <p>present [13] 11:6 14:21 51:7 83:19 98:14 104:8 134:1 158:3 159:24 176:25 184:16 188:22 196:10</p> <p>presentation [6] 10:19 12:8 14:24 22:6,12 214:22</p> <p>presentations [3] 135:24 161:7 163:3</p> <p>presented [18] 21:11 84:13 85:7, 23 87:11 89:11 92:6,14 96:4 105: 24 122:2 129:6 136:6 161:12 172: 4 189:9 193:16 222:12</p> <p>presenting [6] 16:13 33:3 94:1 96: 5 99:17 135:10</p> <p>presents [2] 199:17 207:15</p> <p>president [6] 38:20 51:16,23 107: 9 134:12 212:15</p> <p>President's [1] 224:7</p> <p>presumed [2] 170:18 171:21</p> <p>presumes [1] 191:15</p> <p>pretending [1] 95:18</p> <p>pretty [9] 10:8 27:18 42:1 43:18 83: 24 144:15,15 177:23 182:2</p> <p>previews [1] 80:17</p> <p>previous [3] 88:2 119:16 221:11</p> <p>previously [5] 38:23 55:25 70:10 118:5 222:10</p> <p>price [1] 53:4</p> <p>primarily [7] 33:15 34:19 42:4 58: 12 136:24 138:14 142:9</p> <p>primary [4] 115:10 155:13 156:5 194:7</p> <p>prime [3] 21:19,19,19</p> <p>Princesses [1] 112:14</p> <p>principal [10] 17:12 35:3,4 79:20 86:17 160:9,18 165:15 188:6 205: 12</p> <p>principle [1] 158:13</p> <p>principles [2] 212:17,24</p> <p>prior [21] 8:7,11 28:21 44:18 45:5 58:14 68:20 77:24 83:21 86:1 98: 23 100:11 137:3,6 140:1 145:2 146:19 148:5 149:4 205:22 221: 11</p> <p>priorities [1] 176:13</p> <p>prioritize [1] 182:14</p> <p>private [1] 132:15</p> <p>privilege [1] 186:4</p> <p>pro [2] 39:12 80:18</p> <p>probably [9] 33:24 75:2 145:18 155:1 159:8 175:21 182:5 190:19 211:24</p> <p>problem [9] 22:8 32:3 47:8 62:21</p>
---	---	---	--

<p>63:20 65:4,5 200:24 204:12 problematic [2] 63:2 147:10 problems [7] 196:17,18,20 198:16 199:18 204:17 206:25 procedures [3] 61:21,23 207:1 proceed [4] 11:18 29:11 78:24 121:21 proceeding [12] 6:25 10:18 13: 11 16:6 23:24 28:20 30:12,16,18 31:11,17,20 33:17 36:11 37:8,21, 21,22,22,23,24 42:16 43:21 45:10 48:4 54:6,8,15 57:6,8 58:5 59:9, 10,10,25 60:24 61:11 62:12 73:3, 25 75:16 78:6,16 84:7 86:24 87: 16 88:13 90:21 91:13 92:7,8 99: 19 100:24 105:3,15,19,24 116:3,8 117:13,21 121:17 122:1 124:3 125:24 126:6,7,19 127:2 128:13, 20 129:21 145:7 149:5 152:23 155:2,23 157:3 161:12,24 162:8, 19,21 163:4,7,7,14,15 164:19 165: 22 166:6 169:6,18 170:5,10 173:6 174:10 176:10,14 177:14 181:11 185:3,8,11,15 191:2 192:25 196: 10 209:4 212:7 216:4 217:8 218: 19 219:25,25 220:1,8,10,12,13 226:6 proceedings [48] 9:24 17:21 26: 16 32:11 36:9 37:3,19 38:25 42:5 44:5,22 53:23 55:25 57:2,9,21 58: 1,20 59:4,11 68:20 70:4 75:17 77: 25 83:21 86:13 91:12 98:23 107: 13,25 109:22 113:16 118:6 150:3 152:15 153:9 155:12 157:1,17,23 159:18 160:16 162:4 171:7 189: 17 207:19 211:23,25 process [16] 7:6 59:8 77:5 99:8 138:5 154:9 155:18 158:16 159:2, 5 178:23 181:10,15 182:22 195: 16 198:2 produce [9] 62:5 80:15 96:23 106: 16 108:21 109:7,8 112:18 143:5 produced [10] 23:23 27:15 46:14 54:5 79:4,24 95:5 113:11 167:11 170:12 producer [2] 134:17 194:22 producers [5] 108:25 109:8 132: 15 140:18 184:21 produces [1] 211:8 product [1] 60:5 production [3] 23:9 24:1 207:2 professional [4] 46:16 62:15 160: 4 205:19 professionalism [1] 12:4 professor [8] 55:23 134:21,25 135:8,13 156:16 206:19 208:19 Program [113] 3:2 10:23 18:6,17 23:20 34:7 37:2,14 40:24,25 41: 13,20,20 45:12,17 46:8,11,23 47:6, 13 48:16 49:14 50:11,17 51:1 54: 24 55:7 56:17 60:24 61:5 62:9,13, 14 63:17,23 64:7 65:21 67:8,10</p>	<p>68:11 69:14 72:10,23 78:3,25 79: 9,10 80:21 81:11 85:7 87:11 90:1 94:14,20,25 95:2,5,10,11,16 100: 17,20 109:12 116:11 122:2,4,8 129:14 133:10 144:11 147:25 148: 5,24 157:20 163:22 165:3 176:15 182:3 183:25 184:18,25 185:2,12, 12 186:19 187:21,25 188:10 189: 8 190:1 192:22 194:8 196:7 197:6, 23 198:23,25 199:11,14 200:21 202:7 205:4,13 207:20,21,22,24 208:1 212:6,10 213:7,8 217:16 program-specific [1] 167:25 programming [184] 37:10 16 40: 20 41:10,22 44:1,10,20,21 45:1,6, 16,20 46:2,9,10,13,15 48:21 49:1, 18 50:16,19 51:2,10,13,16,23 52:3, 4,10,12,20,24 53:2,5,9,12,14 54:5, 25 56:8,8 62:11,12,17 63:8,12 64: 2 65:3,8 66:1,2,5,7,19,24 67:1,4 68:9,10,25 69:9,18,19,20,21,22,23 71:7,12 79:8 81:16,17 83:2,5 84: 15 91:18 94:2 97:5 98:9 99:13 106:9,17,20,22,24 107:2,10,19 108:12 109:1,14,17 110:11,14,17, 19 111:21 113:3,9,17,20,23 114:2, 5,8 115:13,14,18,23 116:20 119:9 122:6 123:4 124:12 125:10 127: 18 132:24 133:4,6,8,9,16 134:18 136:14 137:13 138:14,22 140:3,7, 9,10,12,13,18,21,21 141:3 142:10 148:20 149:18 151:12 156:22,24 157:4,25 162:2,3 164:23 168:4,7, 8,12 169:11,15,23 185:4,6,7,13 187:11 188:19 189:7 193:19 197: 6,17,22 198:22,23 199:3,14 202:2, 11 203:1 206:4,9 209:3 213:24 214:9,10 215:4 216:10,15 programs [61] 46:22 63:11,19 65: 6,11 73:19 78:11,11 79:2,3,5,6,9, 12,23,24 80:12,15,16,17 81:9 82: 24 88:25 91:15 95:1,2 96:22 97:6 99:10 102:8 105:4 106:13 108:3,9 111:6 113:10 132:16 133:4,5 165: 4,24 166:1,2,9 167:15 185:21 186: 5 187:4 188:11,16,17 189:6,22 190:11 195:9 199:15 206:6 207: 24 217:5 218:17 progress [1] 32:16 progression [1] 72:8 prohibition [2] 192:2,7 projectable [1] 40:11 projection [1] 95:25 prologue [1] 121:5 prominent [1] 66:6 promised [2] 19:8,10 promoted [1] 81:6 promotion [1] 81:18 proper [1] 101:6 properly [1] 165:10 property [2] 118:2 210:6 proposals [1] 12:12</p>	<p>proposed [4] 8:9 12:10 187:16 213:16 proposing [1] 120:13 propounded [1] 160:11 prospective [1] 222:8 protect [3] 13:4,8 19:6 protective [2] 12:24 13:2 protocol [1] 13:4 provide [19] 33:19,22 35:5 70:15 73:18 84:17 88:20 94:19 97:23 99: 23 100:10 135:22 148:1 159:16 160:13 162:4 176:7 209:13 212:5 provided [17] 8:19 23:25 24:11 54: 1 91:4 94:5 100:6 101:20 107:1 113:6 115:6 137:20 145:19 146:8, 14 162:20 205:3 providers [1] 205:17 provides [9] 57:10 69:4 109:19 137:20 163:16 207:4,13 213:10 providing [8] 8:20 30:14 51:5 77: 5 78:14 98:4 110:19 135:3 205:18 provision [1] 192:15 proxy [1] 90:4 PTV [1] 103:5 PTV's [1] 103:11 Public [134] 3:13 10:21 13:13 16: 17,23,24 20:11 31:24 34:15 38:21 43:3,6,7 44:10 49:3 55:4 78:3 80: 16 104:23,25 105:17,21,21,25 106: 1,4,8,12,19,25 107:6,8,19,23,24 108:1,2,8,14,16,24,25 109:5,17 110:2,3,4,7,10,13,16 111:8,17,18, 20,24 112:4,23 113:5,21 114:1,3,6, 10,17 115:4,5,20,25 116:3,6,9,14, 20,23 117:2,6,18,23 118:15 119:1, 3,10 120:5,12 121:11,23 122:5,9 123:3,8,10,14,17,21 124:15,17,22, 24 125:3,9,19,21 126:3,7,12,15,21 127:2,5,11,18,22 128:2,6,10,14,20, 25 129:3,7,11,14,20,24 130:8,12 132:15 133:6 197:9,13 218:14 219:23 220:3 published [1] 39:5 pull [2] 30:18 169:22 pulp [1] 7:24 purchasing [1] 37:16 pure [1] 50:8 purely [1] 50:20 purport [3] 27:2 35:4 174:3 purported [2] 71:5 112:6 purporting [1] 216:19 purports [2] 95:12 197:3 purpose [6] 6:19 57:1 73:15 85:15 89:14 208:8 purposes [11] 8:16 9:1 15:7 17:21 19:6 30:25 152:17,23 193:4 208:3 219:15 pursuant [1] 186:1 put [12] 47:17 82:22 90:15 105:11 126:16,25 137:25 169:7 171:22, 25 172:1 180:19 putting [4] 51:3 83:18 169:25 175:</p>	<p>12 Q qualifying [1] 40:18 qualitative [1] 151:21 qualities [1] 53:7 quality [2] 138:6 140:3 quantitative [9] 84:10,18 100:17 101:1 103:16 116:2 136:5 147:24 151:21 quarter [1] 74:5 question [38] 13:15 24:13 40:18 41:3,16,17 47:12,80:2 87:24 119: 13 122:13 128:4 142:22 149:20 162:2,24 165:20 181:6 182:12 186:21 187:5 195:10,17 199:17, 19 200:2,12,14,17,18,24 201:4,7 202:20 203:8,9 218:8 219:11 questionnaire [5] 40:17 197:7 199:23 203:15 207:20 questionnaires [1] 40:16 questions [20] 28:6 40:22,25 41:8, 15 82:15,16 104:13 148:19 164: 12 167:25 170:11 179:2 199:5,9, 23,24 200:16,22 217:22 queue [1] 20:4 quick [1] 58:9 quickly [1] 177:24 quite [6] 44:15 163:20 170:4 173: 23 177:18 218:13 quoting [2] 53:24 54:3 R race [3] 64:19,20 95:4 radio [3] 96:15 132:20 138:15 raise [1] 134:3 raised [4] 42:5 58:20 109:24 182: 13 random [2] 39:22 213:2 range [13] 54:4 83:7 106:14 121: 10 129:25 130:3 139:23 151:1,5 158:10 162:23 163:9,10 ranging [2] 145:22 147:21 rank-order [1] 41:14 ranking [11] 199:10,13,14,20,20 201:2,2,10,20,21 202:12 rate [3] 40:3 124:8 167:16 rated [1] 110:23 rates [2] 117:12 154:25 rather [9] 72:18 80:11 118:7 142: 18 161:9 173:25 174:15 194:25 218:5 ratings [4] 107:1 111:8 163:25 191:14 rational [1] 155:14 raw [1] 188:24 reach [4] 142:20,21 178:4 220:17 reached [3] 42:19 68:20 180:4 reaching [2] 71:8 73:21 read [10] 10:7 24:7 25:21 89:8 107: 5 112:2 204:22 217:12 221:2 222: 21 reading [2] 10:6 113:14</p>
--	--	---	---

<p>readjusted [1] 177:6</p> <p>ready [1] 28:15</p> <p>real [2] 50:25 119:6</p> <p>real-world [1] 96:25</p> <p>reality [2] 44:8 112:9</p> <p>realizing [1] 221:25</p> <p>really [34] 13:22 23:12 24:2 41:8,9, 25 43:25 45:11 59:23 62:21 63:8 67:3 72:1 75:2,5,8,19 86:18 153: 24,25 174:5,10 180:22 184:2,10 193:2,9,11 196:15 204:14 216:16 218:20 219:12 221:22</p> <p>realtime [4] 14:2,4,10,15</p> <p>reason [17] 9:12 10:13 13:1 24:22 50:14 89:3 94:18 111:16 114:3 125:2 188:8 193:5,6,14 196:5 204: 17 217:3</p> <p>reasonable [3] 91:10 189:15 206: 8</p> <p>reasoning [1] 124:18</p> <p>reasons [9] 19:19 25:7 35:11 47: 10 86:22 94:16 188:7 204:15 215: 4</p> <p>rebutals [1] 210:11</p> <p>rebuttal [22] 11:23,24 21:10 100: 13,16,18,22 101:8,13 145:5 175:1 177:16,17 181:13,17 206:10,24 208:3 209:15 210:7 213:10 220: 25</p> <p>rebuttals [1] 191:3</p> <p>rebutting [1] 101:8</p> <p>recalculate [1] 103:8</p> <p>recall [1] 118:4</p> <p>recalling [1] 19:9</p> <p>receive [3] 36:22 66:23 76:2 103:6 181:12 182:8 192:20,23</p> <p>received [18] 8:14 23:10 27:11,11 31:16 36:21 42:23,24 43:5,6 74: 19 117:24 118:20 151:24 164:21 181:13,25 223:7</p> <p>receives [2] 56:18 128:15</p> <p>recent [3] 11:13 147:16 150:23</p> <p>recently [2] 96:14 190:6</p> <p>recess [10] 10:11 76:9,14,17 130: 18 131:3 178:12 179:19,20 224: 18</p> <p>recessed [1] 224:19</p> <p>reconvene [2] 130:19 224:20</p> <p>record [34] 9:7,7,13,14 14:20 39: 15 53:19 54:21 55:14,19 70:1 71: 19 75:22,23 77:9 87:10 99:19 101: 14 104:1,9 106:25 107:16 132:9 170:6 177:19,23 179:13,15,16 180:18 184:24 217:12 219:23 223: 9</p> <p>recorded [1] 104:18</p> <p>recording [1] 14:6</p> <p>records [3] 8:7 63:25 170:23</p> <p>redacted [1] 13:13</p> <p>redoes [1] 72:2</p> <p>reduce [2] 161:18 185:4</p> <p>reduced [1] 213:6</p>	<p>refer [4] 31:1 33:18 53:14 221:1</p> <p>reference [2] 39:5 208:12</p> <p>referred [1] 77:25</p> <p>refine [1] 42:3</p> <p>reflect [5] 56:12 58:20 74:11 143: 24 144:23</p> <p>reflected [5] 50:4 52:25 74:21 115: 25 127:10</p> <p>reflecting [2] 50:24 144:24</p> <p>reflects [2] 186:22 188:25</p> <p>refused [1] 197:10</p> <p>regard [12] 144:17 178:7 180:4 191:6 193:18 197:20 199:13 200: 7 203:1 217:19 221:8,15</p> <p>regarding [7] 11:22 12:10 13:16 27:25 117:14 157:1 160:13</p> <p>regardless [1] 38:2</p> <p>Regent [1] 156:16</p> <p>regime [1] 213:21</p> <p>region [3] 83:23 141:20,25</p> <p>regional [1] 81:2</p> <p>Register [1] 54:11</p> <p>regression [98] 25:10 34:5,6,23 35:15,15,21,22 56:3,21 57:4,10,18, 20 58:6 72:13,18 74:15,17 85:11, 12,14,18 89:12,22 90:12,13,17 91: 3,4 92:15,22 93:18,23,25 94:6 95: 24 98:15,17 99:2,14 100:24 101:6 103:20 116:24 126:10,16 129:6,9 130:5 135:3,4,5 136:3,7,8,10 137: 10,17 138:12,13,25 139:4,5,22 140:23 142:13 144:22 145:14,16, 25 146:7,15,18,25 150:9,19,19,21, 22 151:19 161:5,11,15,17 172:24 173:2,11,15 175:4,11 176:7 188: 23 212:19,25 213:15,18 216:17</p> <p>regressions [16] 53:1 55:18 57:12 58:24 72:17 75:5,7,10 105:8 127: 11 138:3,8 139:11 147:8,8 176:4</p> <p>regulated [2] 174:6,7</p> <p>regulation [9] 191:20 192:4,5,7 200:10 214:20</p> <p>regulations [3] 23:20 26:17,24</p> <p>regulatory [2] 134:9 192:15</p> <p>rejected [3] 75:18 90:8 225:16</p> <p>relate [4] 39:16 83:3 174:12 191:8</p> <p>related [5] 23:4 50:15 98:3 174:13 218:8</p> <p>relates [4] 83:4 160:24 173:9 181: 5</p> <p>relating [3] 6:20 8:2 180:24</p> <p>relation [1] 208:9</p> <p>relationship [2] 56:5 147:13</p> <p>relative [59] 36:17 37:1,13 54:1,5 57:11 68:8,10,17,18 70:6 84:13 86:3 88:4,22 91:11,14,25 92:16 98:8 101:7 105:3,6,13,22 110:6 111:25 114:17 116:1,6,14 120:14 121:10,16 123:3 124:11 127:3,5, 22 129:20 135:23 136:5 137:5 138:10 139:6 144:18 148:2 186: 17,18,23 187:24 188:4 189:16</p>	<p>201:19 208:12,13 209:2 213:7 215:3</p> <p>relatively [5] 56:14 111:17 153:17 154:6 158:9</p> <p>relevance [2] 70:14 87:15</p> <p>relevant [11] 43:11,19 51:16 54:22 59:6,7 67:14 70:19 80:4 190:14 191:14</p> <p>reliability [2] 98:20 99:3</p> <p>reliable [13] 60:5 62:20 70:16 73:9 74:19 148:17 160:14 162:7 199:7 204:20 210:20 211:8,9</p> <p>reliably [1] 102:17</p> <p>reliance [3] 75:24 161:25 176:19</p> <p>relic [1] 193:11</p> <p>relied [5] 85:8 90:4 94:16,17 159: 14</p> <p>relief [1] 26:4</p> <p>relies [2] 74:1 102:3</p> <p>religion [5] 157:13,21 158:24 168: 7 169:8</p> <p>religious [9] 156:22,24 157:4,24 167:15 168:8,12 169:11,15</p> <p>rely [10] 9:5 13:6 35:19,25 92:5 113:7 155:13 159:3 190:7 212:7</p> <p>relying [11] 34:19 57:15 58:12 62: 3 71:3,11 73:12 163:24 170:18 212:16,23</p> <p>remain [1] 89:1</p> <p>remainder [2] 34:25 201:25</p> <p>remained [2] 19:14 41:25</p> <p>remaining [4] 34:8,18 69:21 177:8</p> <p>remains [1] 11:12</p> <p>remarks [2] 153:7 177:12</p> <p>remember [7] 25:19 28:16 49:20 67:9 70:9 201:13,22</p> <p>remind [4] 10:24 197:15 224:8,10</p> <p>reminded [2] 153:8 157:6</p> <p>removed [1] 146:4</p> <p>removing [2] 8:7 146:10</p> <p>renowned [1] 101:23</p> <p>reopen [1] 13:20</p> <p>repeat [1] 212:22</p> <p>repetitive [1] 106:21</p> <p>replaces [1] 95:23</p> <p>replicate [3] 57:23 61:20 62:22</p> <p>replicates [2] 61:22 196:11</p> <p>report [9] 70:20 71:2,11,13 72:2 87:9 118:10 208:5 210:11</p> <p>Reported [2] 1:24 79:17</p> <p>reporter [9] 9:22,22 226:10</p> <p>reporters [1] 81:1</p> <p>reports [4] 103:20 140:4 209:17, 23</p> <p>represent [9] 18:17 30:6 77:16 97: 2 104:25 152:7</p> <p>representation [3] 26:25 27:5,9</p> <p>representations [1] 7:2</p> <p>representative [3] 15:21 109:21 207:20</p> <p>representatives [2] 14:21 185:17</p> <p>represented [7] 28:7 37:7 86:11</p>	<p>105:5 120:17 152:18 185:14</p> <p>representing [3] 17:10 76:25 78: 6</p> <p>represents [4] 31:15 77:14 107: 24 119:6</p> <p>request [9] 22:2,11 23:18 26:12 177:10 218:22</p> <p>requested [2] 32:1 48:1</p> <p>requesting [1] 102:21</p> <p>requests [9] 23:10,15,16 24:2,12 25:11 26:18 160:6</p> <p>require [8] 8:15 11:15 12:19 28:20 161:2 189:21</p> <p>required [1] 39:2</p> <p>requirement [1] 192:15</p> <p>requires [1] 166:4</p> <p>requiring [2] 13:3 21:15</p> <p>reruns [2] 64:17,18</p> <p>research [17] 37:3 38:22 39:5 40: 1 58:17 97:18,22 117:25 156:23 207:11,12,13 209:11 210:2,5 212: 3,15</p> <p>reserve [1] 221:12</p> <p>reserving [1] 222:23</p> <p>resolution [2] 11:16 155:7</p> <p>resolve [4] 7:4 104:10 163:19 203: 3</p> <p>resolved [3] 20:25 177:24 178:2</p> <p>resources [2] 7:19 154:18</p> <p>respect [11] 8:17 10:3 25:9 36:6 78:2 90:18,19 181:12 197:22 209: 1 217:16</p> <p>respectfully [1] 175:2</p> <p>respectively [1] 217:14</p> <p>respond [4] 59:22 60:3 177:22 200:15</p> <p>respondent [12] 40:23 46:7 197:8 200:2,4,9,13,15 203:9,11,14,19</p> <p>respondents [25] 45:5 46:3,12,25 48:25 52:15 63:13 64:1,22 65:6, 13,22 95:8 149:24 197:16 200:1 201:6 202:16,24 203:17 204:3,6, 11 208:8,15</p> <p>responding [3] 200:13 201:6,10</p> <p>response [9] 11:24 23:10 25:21 40:3 92:11 124:8 200:2 204:10</p> <p>responses [4] 40:10 149:1 210:15, 16</p> <p>responsibility [1] 52:11</p> <p>responsible [4] 40:20 52:8 97:13 212:3</p> <p>responsive [1] 23:21</p> <p>rest [4] 80:3 94:22 107:3 112:22</p> <p>restricted [9] 12:25 13:16 14:7,13 20:16 218:24 219:10,13,15</p> <p>restriction [1] 192:13</p> <p>result [13] 13:6 45:23 91:17 126:9 129:4 162:18 163:16 164:6,7,13 167:20 171:20 176:8</p> <p>results [51] 35:10,22 36:3,5 40:11 47:16 48:23 52:22 53:21 54:16,18, 20 57:12,16 58:4,7,13,23,25 59:3</p>
---	---	--	--

62:6 76:3 90:14 91:3 94:7 98:20 99:3 105:7 116:18 137:7 139:22 142:7 143:4 144:20,23 145:21 146:3 148:10 149:6,23 151:4 157: 19 160:19 162:12 176:2 177:4 198:24 199:6 203:22 204:20 211: 9 resume [1] 224:3 resumed [2] 76:18 179:21 retain [4] 77:16 88:7 137:14 186: 19 retained [2] 36:25 77:12 retaining [1] 53:3 retention [1] 208:10 retirement [2] 206:18 211:15 retransmission [4] 82:8 137:15 141:13 189:22 retransmissions [2] 137:24 151: 16 retransmit [5] 97:7 137:13 142:8 151:13 216:24 retransmits [1] 194:13 retransmitted [2] 77:20 82:3,13 108:6,10 132:17,25 133:21 138: 18,19 141:17,19,23 143:11 144:1, 5 145:9 146:2 164:24 170:25 192: 14 retransmitting [1] 165:9 return [1] 209:14 reveal [2] 136:11 215:6 revealed [1] 139:12 reveals [3] 88:24 138:7 198:12 review [1] 12:19 reviews [1] 174:6 revised [4] 34:10 75:25 162:18 199:4 Richard [1] 9:18 richer [1] 137:21 rights [4] 52:3,9 134:7 195:15 Ringold [3] 135:7 142:4 209:18 ripple [1] 21:9 rise [1] 49:10 risen [1] 36:10 Rivers [1] 209:25 RMR [1] 1:24 Road [1] 112:13 roadmap [1] 30:9 Rob [1] 16:21 ROBERT [2] 2:3 3:16 Robles [1] 4:11 robust [2] 72:5 89:7 Rock [1] 46:20 role [5] 53:3 102:1 109:4 114:19 212:8 Ron [2] 16:19 104:25 RONALD [1] 3:14 room [14] 7:10,15,22 9:15 12:17 13:18,19,23 15:14 19:7 21:20 36: 16 154:23 165:19 rose [1] 119:4 Rosston [4] 57:5 94:9 98:23 161: 12	roughly [7] 103:24 116:23 126:8, 14 142:5 143:12 144:5 royalties [34] 36:18,22 40:8,13 43: 24 44:9 45:24 54:9 56:6 61:17 77: 7 82:23 88:16 93:4,12,14,14 95:7 103:7,12,25 117:12 139:24 154: 12,13 157:16 169:23 170:19 171: 1 173:20,21 185:25 193:13 217:4 ROYALTY [20] 1:1,7 6:13,14 7:1 38:24 39:24 54:19 87:21 139:1 143:6 147:21 154:10 169:24 172: 1 188:1,3 189:10 210:18 213:4 rule [1] 11:14 ruled [1] 184:5 rules [4] 23:19 28:19,23 82:6 ruling [4] 22:3,12 180:21 221:19 rulings [1] 162:9 run [5] 75:4 79:10 174:17,18 183: 22 S S.E [1] 1:16 safe [1] 114:8 sale [1] 79:20 sales [1] 159:20 same [38] 21:11 23:25 36:21 42:8 50:22 52:3,4,5,5,14,15 54:10 55: 15 60:1,2 61:15 62:1 63:20 64:19 75:6 86:13 87:13 114:23 120:17 127:25 128:19 144:23 157:21 164: 13 165:4 178:19 195:5 198:4 200: 22 210:16,18,23,25 sample [12] 39:22 66:20 102:2,6, 13 117:17 123:20,21,23 142:18 149:24 213:2 samples [3] 93:24 98:19 206:22 sampling [1] 206:25 Sanders [10] 159:17 164:14 168:3, 13,20 169:9 170:1 172:7 173:4 176:24 Sandy [1] 16:22 satellite [7] 7:1,3 37:5 44:25 51:8, 25 190:4 satisfy [1] 112:19 SATTERFIELD [15] 4:3,4 17:6,7 132:11 218:7,9 219:3,6,11,20,24 220:9,13,18 Saunders [1] 205:2 savvy [1] 20:8 saw [3] 50:17 111:7 145:3 saying [7] 23:17 25:22 61:14 120: 25 168:21 169:3 191:21 says [11] 61:19 63:10 66:16,20 68: 8 71:25 72:1 79:24 88:19 95:14 170:1 scene [1] 60:9 schedule [4] 6:25 29:14 78:25 108:22 scheduled [4] 11:17 25:3 32:22 82:19 scheduling [1] 33:10 scheme [2] 193:12 194:17 Scholer [1] 2:8	school [3] 80:19 135:8 208:21 Schurz [2] 96:12 99:25 Schwartz [1] 15:16 science [4] 106:11,18 110:15 115: 12 Sciences [1] 39:7 scores [1] 38:11 Scott [1] 16:23 scrambling [1] 6:5 scratching [1] 111:1 screen [1] 30:19 SDARS [1] 118:6 SDC [4] 144:14 148:24 152:25 160: 17 SDC's [2] 23:18 26:11 SEAN [2] 2:4 15:4 search [1] 220:5 season [1] 80:18 seat [1] 132:12 seated [6] 6:4 7:10 9:15 76:19 132: 3 179:22 Seattle [1] 108:19 second [14] 23:4,7 41:12 56:3 57: 6 85:11 93:21 100:22 160:22 181: 3 193:14 199:12 206:16 212:21 second-rate [1] 140:20 seconds [3] 180:14 214:1,4 secret [1] 196:7 Section [12] 6:16,21 7:1 39:24 45: 24 51:2 56:6 67:19 115:21 133:20 186:2,3 see [50] 8:23,23 24:21 31:14,17 32: 2 33:2 34:2,13 35:16 43:14,20 44: 13 46:12 47:19 48:11,13 50:5 54: 14 57:1 59:21 60:16,18 69:8 73: 20 74:2 80:7 83:14 89:19 103:22 105:23 110:24 121:17 122:25 141: 9 143:12 144:7,16,22 150:24 157: 9 175:11 204:5,7,12 209:20 211:3 218:14 219:17 222:13 seeing [1] 85:15 seek [5] 155:5,5 173:18 217:11,17 seeking [8] 31:4,18,25 49:6 102: 25 130:12 176:8 217:19 seeks [1] 40:19 seem [2] 29:2 214:3 seems [1] 84:6 seen [2] 104:9 146:19 sees [1] 173:4 select [3] 106:12 140:24 206:4 selected [3] 79:12 87:3 206:22 selection [1] 147:15 self-designated [1] 6:22 seller [4] 168:15,18 169:22 189:2 seller's [1] 169:18 sellers [1] 193:22 selling [3] 87:14 186:15 188:16 sells [1] 195:12 send [2] 182:8,9 senior [7] 9:17 51:15,23 96:12 107: 9 134:7 211:14 sense [5] 23:1 35:4 52:22 55:13	160:13 sensitive [2] 12:21 175:4 sent [1] 47:11 sentiment [1] 216:12 separate [4] 65:2 102:23 155:20 207:21 separately [1] 30:24 September [3] 70:19 71:19 181: 14 series [1] 185:5 serious [2] 22:8 161:13 serve [2] 7:14 23:8 served [1] 112:11 server [1] 19:25 serves [2] 44:8 147:22 service [1] 109:12 services [3] 88:8 205:19 207:13 serving [1] 109:21 Sesame [1] 109:1 SESSION [2] 132:1 225:11 SESSIONS [1] 225:13 set [6] 23:8 39:4 95:22 128:3 175:5 176:2 sets [1] 30:17 setting [2] 106:25 199:22 settled [1] 38:3 Settling [8] 4:15 5:2 20:20 101:3 152:8,19,25 197:23 Seventeenth [1] 5:7 several [11] 19:14 36:1 43:1 58:22 62:20 100:7 121:2 123:20 188:25 196:14 207:17 Shagrin [2] 101:21,23 shapes [1] 108:15 share [6] 27:23 33:22 34:17,24 36:21 44:15 45:24 47:20 48:1 49: 8,11 50:2,7 56:22,23 70:5,5,10 72: 11,24 73:1 84:20 91:25 95:10 103: 3,6,7 104:3,5 105:25 106:4 116:7 117:23 121:24 124:23,24 126:8, 13 128:14,21 129:3,7,11 158:5,8, 24 159:4 160:6 162:14,16,18,20, 22,25 163:5 165:14 166:5,7,25 181:18 188:4,7,11 198:20 shared [1] 8:24 shares [36] 33:19 45:12 48:15 54: 19 74:23 84:13 85:16 87:23 88:20 89:14,17,23 102:22,24,25 103:8, 21 120:6 124:5,20 130:6 139:23 143:6 145:21 146:20 147:21 150: 14,15 160:3,15,21 161:19 170:13 174:3 177:1,6 shares' [1] 95:22 shaved [1] 15:6 Shaw [1] 5:6 She's [1] 139:1 shebang [1] 168:25 shifted [1] 111:19 short [2] 106:5 110:24 shortcomings [3] 86:9 91:24 207: 18 shoved [1] 22:24
--	--	--	--

<p>show [40] 31:8 39:16 49:7 56:15 58:15 63:25 64:12 67:16 70:8 71: 6 74:6 84:3 96:1 103:13 106:2 110:6 114:10 116:13 119:25 122: 14 123:2 127:11 138:23,23 140:7 141:14,22 145:21 150:13 184:24 187:21,25 191:3 193:17,24 194:9, 10,16,22 198:10 showed [9] 71:11 72:10 84:25 90: 16 109:25 116:16,17 142:6,7 showing [6] 44:13 46:8 99:20 144: 8,12 167:18 shown [2] 43:14 132:16 shows [35] 33:21 46:19 56:21 64:8 69:3 72:8 80:17,18,19 83:20 110: 20 112:17,20 113:24 125:18 127: 25 136:23 137:1 139:13 140:2 141:7 142:2 145:5 166:16,25 170: 6 185:18,19,19,20,20,21 195:2, 2 Shum [4] 135:12 147:11,20 150:24 shut [1] 19:7 shutdown [4] 18:23 224:9,11,12 side [4] 51:1,25 52:1 169:18 sight [3] 155:24 159:4 175:22 signal [57] 10:12 42:23,25 43:6 47: 1 49:23 50:2 52:16 56:8 60:17 64: 15 65:16 66:11 67:15 69:6 70:11 71:7,9 73:23 81:15 83:4 94:3 98:9 99:25 102:8,17 106:11 108:9,13 118:20 123:18 133:7,14 139:1,8, 14,16 142:23 143:22 148:23 149: 20,21 166:10 168:24 170:9,15,24, 25 171:18 172:18 192:14 194:13, 20,21 206:9 215:4 216:24 signals [93] 41:2,4,11 42:17 43:1, 5,8 47:9 49:18 65:9 72:6 73:21 77: 21 78:8 82:1 83:13,16,18,22,23 93:10,11 97:1,8,14 99:24 102:12 110:3 115:7 117:19 118:23 119: 10 123:11 126:4 132:17 133:9,18, 24 136:15,16,17,20,24 137:2,13, 18,25 139:19,21 141:12,16,18,22, 23 142:3,9,12,19 143:1,9,11,25 144:4,9,14,17 146:2 147:5 149:25 151:11 153:23 164:24 166:20 167: 4,14 168:1 169:2 172:13,15 186:6, 15 188:12 191:17 192:2 197:8,10 198:5 201:10,14,15 202:7 206:6 216:24 signature [4] 81:17,24 109:16 226: 10 signed [1] 13:18 significance [1] 44:14 significant [19] 42:14 43:18 44:19 51:9 66:11 102:1 103:11 104:3 119:18,19 139:25 162:19 167:20 168:3,13,24 169:21 172:20 196: 23 significantly [6] 94:7 105:22 125: 9 150:25 151:23 215:11 Silberberg [2] 3:8 18:12</p>	<p>similar [6] 62:7 112:16 124:8 129: 5 136:7 146:16 148:20 150:10 Similarly [3] 92:14 144:11 216:12 simple [2] 128:13 143:17 simplicity [1] 30:25 simply [23] 22:1 25:25 34:16,24 41: 14 45:5 47:12 55:11 59:12 65:1,7 66:19 70:5 72:21 74:19 82:22 95: 14 103:5,7 149:25 173:23 198:6,7 simultaneous [1] 114:25 simultaneously [2] 44:25 45:2 since [16] 7:25 32:4 38:1 105:19, 23 129:20 137:3,6 143:10 145:1 153:11 154:2 161:24 168:22 190: 15,15 Singer [9] 32:22 33:4 51:11,12 52: 18 206:12 223:23 224:4,4 single [13] 62:14 67:6 72:12 87:9 95:23 106:11 133:16 170:15 172: 24 176:6 182:2 188:4 191:1 sitcom [1] 194:9 sitcoms [1] 185:17 situ [1] 155:3 situation [2] 139:18 160:23 situations [1] 139:20 six [7] 10:17 29:20 33:2,19 56:17 100:23 143:11 sizes [1] 108:16 skating [2] 65:15,16 skill [2] 10:3 226:4 skills [2] 113:6,14 slided [1] 35:8 slide [28] 30:8,17 31:3,8 32:18 33: 14,21,24 35:3 40:15 43:14 46:6 47:18 50:5,14 54:13 63:24 65:7 69:2 70:10 72:8 74:2 95:4 114:9 115:9 123:1,6 124:21 slides [3] 20:16 54:16 146:19 slightly [4] 38:14 80:8 144:14 200: 23 slow [1] 218:5 small [10] 49:9 83:14 96:16 142:20 149:9,25 154:17 157:17 158:24 175:5 smaller [2] 32:14 132:19 smart [1] 175:15 so-called [2] 85:22 208:6 social [1] 113:14 society [1] 157:14 solicited [1] 21:1 solve [4] 47:7 somebody [1] 29:19 somehow [1] 202:2 someone [1] 223:22 sometime [3] 182:21,24 202:17 Sometimes [3] 48:2,3 165:3 somewhat [3] 62:6 191:12 202:22 soon [2] 11:15 180:21 sophisticated [2] 12:20 204:6 sorry [16] 20:21 28:14 83:8 91:1 134:22 135:17 138:19 140:5 151: 21 177:2 178:11 179:25 183:1</p>	<p>190:12 196:4 220:9 sort [29] 7:18 27:7 32:3 44:6 59:24 74:21 78:5 84:4 86:7 87:5 152:21 153:5,6,6,8 154:14,21 157:12 159: 22 163:2 167:6 174:6 175:16,17, 22 177:11,22 180:23 193:14 sorts [1] 35:9 sought [3] 37:12 74:3 140:19 source [2] 80:11 114:8 sources [4] 53:11 60:18 212:19, 25 Sox [1] 46:18 spanning [1] 111:15 speaking [1] 10:4 spearheads [1] 132:22 specialist [1] 134:7 specialists [1] 113:13 specialized [1] 210:4 specializes [1] 37:4 specials [1] 185:6 specific [8] 42:11 58:18 94:19 137: 24,25 166:14,23 167:15 specifically [3] 46:17 188:2 222:3 specifics [1] 85:9 specious [1] 23:18 spectrum [1] 114:23 speculation [1] 163:1 speed [2] 10:5,7 spend [3] 77:3 208:15,16 spent [8] 7:17 41:19 51:21 68:25 69:18 96:10 154:18 156:22 sponsored [2] 37:18 61:12 sponsoring [4] 34:3,6,8 56:4 Sports [72] 2:2 10:20 14:24 15:2 20:12 22:6 27:24 30:4,7,11 31:4, 12 33:23 36:25 37:1 38:10 46:16 47:19 48:14 49:17 50:22 52:23 62: 15 63:23 64:2,5,6,11,14,23,24 65: 3,8,14,23 66:1,2,3,16,18,20,21 67: 2,16 79:6 80:16 81:2 85:5 89:20 95:1 116:21 126:11 129:5 133:11 142:25 157:19 176:14 185:20 196: 24 197:5 198:18,20,22 199:3 205: 20,21 206:13 207:22,23,25 208:2 210:10 spring [1] 30:1 Squire [2] 2:14 15:12 staff [2] 8:6 14:22 stake [1] 171:11 stand [2] 14:19 25:14 standard [14] 36:17 47:12 92:9 136:1,1,2 158:17,18 186:9,10,17 191:7,7 207:5 standards [6] 39:2,4 58:16 163:18 186:23 187:24 standing [1] 221:24 stands [1] 167:22 Stark [1] 106:20 start [3] 110:9 128:17 218:5 started [3] 20:22 32:11 85:25 starting [6] 87:22,24 117:22 124: 20 131:1 143:14</p>	<p>starts [1] 194:6 state [4] 12:14 23:21 26:17 141:8 stated [1] 215:1 statement [18] 11:9 13:24 15:21 17:2,13 18:18 20:11,14 27:16 29: 3 30:3,20 76:21 104:22 132:6 152: 4 162:13 183:24 statements [14] 10:19,25 11:1 26: 12 28:25 41:5 76:13 139:2 162:11 177:17,17 187:2 221:1 225:2 STATES [9] 1:1 133:20,22 139:10 140:14,19 141:13,24 205:25 stating [1] 124:11 station [24] 42:20 44:24 67:10 79: 1,10,11,25 80:1 81:6,7,14,20,20, 21,22 82:2,3 94:2 95:5,6 108:20 109:17 195:13,13 station's [2] 80:25 81:4 stations [47] 43:4 44:10,11,12 46: 14 55:5,5 66:20 67:11 77:20 78:7 79:3,4 80:14 81:12,23 82:9,11 83: 8,10,17,22 84:2 96:15,16,23 97:1, 7 99:11,21 100:1 108:5,18 109:6, 8,13,16,20 114:24 115:6 132:25 138:21 148:21 165:9 172:11 185: 22 213:2 stations' [1] 97:5 statistical [1] 70:21 statistically [1] 167:19 statistics [3] 99:17 160:8 206:19 statutorily-prescribed [1] 213: 19 statutory [1] 194:19 stave [1] 22:10 stay [1] 29:7 Stec [8] 209:21,21,22 210:1,4,7,11, 14 Stec's [2] 210:22 211:10 Steckel [9] 201:4 208:19,19,25 209:5,7,10,15,20 Stella [2] 92:25 137:19 stenographic [1] 226:5 Stern [1] 208:21 STERNBERG [2] 4:17 18:2 STEWART [19] 2:19 15:25 16:1,13, 16 76:20,23,24 78:10 89:10 104: 15,16 105:10 148:9 152:10 154:5 158:17 215:25 225:4 still [17] 8:1 30:6,6 63:20 73:8 82:7 91:1,4 94:10 120:10,16 125:3,14 154:14 171:5,18 179:4 stipulation [1] 179:7 stock [2] 7:23,25 stocking [1] 89:19 stood [1] 159:3 stop [2] 10:13 122:12 stopped [1] 20:6 stories [2] 81:3 113:10 storm [3] 22:11 26:6 81:22 straight [2] 76:10 144:4 straight-up [1] 96:5 Strasser [1] 9:18</p>
---	---	--	---

strategic [1] 205:18 strategies [1] 12:21 strategy [2] 107:12 181:22 stratification [1] 39:23 stratified [2] 39:22 123:20 stream [2] 14:6 115:10 streamed [2] 14:4,14 streaming [1] 14:10 streamline [1] 107:13 streamlined [1] 12:7 Street [2] 2:15 3:9,19 4:5,19 5:7 strengthening [1] 59:5 strengths [1] 86:8 STRICKLER [10] 1:12 7:12 60:7, 13 119:12,15 120:3,8,15,23 128:8 191:21 192:6,9,19 195:20 Strickler's [1] 122:13 strike [3] 21:3 221:14,19 stronger [1] 163:5 strongly [1] 54:4 structural [1] 98:6 structure [3] 99:1 109:15 174:1 students [1] 156:17 studies [40] 30:15 31:2 33:16,18, 22 34:3,8,13,20,22 35:3,8 53:18 55:17 56:5,10 58:3,5 84:10,18,22, 24 86:2,9,17 87:6 96:4,5 100:7,17 103:16 104:11 105:9,11 121:17 127:16 137:8 140:4 158:21,23 study [57] 34:10,12,16,23 36:7 53: 25 55:21 57:1 67:20 68:12,14 70: 15 72:6,9 73:7 75:13,25 85:18,21, 22 86:22 87:11,18,22 88:23 89:7 90:2,9 91:21 92:12,23 93:18,23, 25 94:18 95:12 96:3 98:16 99:18 100:19,21 101:1 102:3,16 127:1, 21 129:14 135:14 142:18 145:17 147:9,18 150:23 151:6,19 167:3 172:24 stuff [1] 179:13 stupendous [1] 10:2 style [1] 136:7 sub-group [1] 93:15 sub-groups [3] 93:5,10,19 subject [2] 176:20 189:23 submission [4] 61:2 134:13 180: 25 181:7 submit [3] 33:6,12 95:11 submitted [14] 34:16,22 39:9 56:1 70:20 72:9 100:5 116:2 128:7 130: 6 140:17 206:12 210:10 220:23 submitting [2] 34:12 156:6 subscribe [2] 89:1 154:1 subscribed [1] 89:1 subscriber [15] 61:3,8 93:5,15 97: 11 118:18,19,21,24 119:3,5 143: 19,21 208:9 216:10 subscribers [29] 42:19,21,23 43:5 52:5 53:4,16 60:25 66:23 67:13 73:22,22,23 88:7,10 91:19 114:2 115:21 116:4 118:22,23 137:14 144:10 151:14 153:22 170:8 186:	20 189:6 216:8 subscribership [1] 189:24 subscriptions [1] 87:14 substance [1] 181:3 substantial [2] 70:23 92:22 99:6 100:10 110:7 123:2 129:19 168:6 substantially [2] 23:25 44:16 substantiate [1] 196:20 substitute [1] 168:8 substituted [2] 63:12,14,15,19,19 165:24 166:9 197:17 substitutes [1] 168:7 substitution [2] 21:15 169:16 substitutions [2] 21:18 22:8 subtract [1] 201:16 successful [1] 110:22 Sue [1] 205:11 suggest [4] 54:17 86:24 122:18 176:9 suggested [2] 48:24 85:14 86:5 94:15 103:23 149:9 suggesting [2] 101:5 122:22 Suite [3] 4:5,11,19 sum [10] 41:17 61:13 125:25 142: 17,22 143:3 149:19,22 150:2 201: 4 summarize [3] 159:24 160:5 164: 14 summary [2] 46:8,11,15,23 47:11 58:9 63:18 201:8 summed [1] 106:16 summer [1] 202:17 Superbowl [2] 174:17,18 superficial [1] 106:21 superfluous [1] 175:17 superstation [1] 69:5 supervised [1] 208:23 supplement [2] 23:9 109:14 supplemental [1] 23:9 Supplier [2] 148:24 205:13 Supplier's [1] 205:14 Supplier/Horowitz [1] 148:6 Suppliers [47] 3:2 10:23 18:6,17 23:20 34:7 45:12,17 49:14 50:11, 18 54:24 60:24 61:5 62:13 64:7 68:11 78:3 85:7 87:11 90:1 95:11 100:20 122:2 129:14 133:11 147: 25 157:20 163:23 176:15 182:4 183:25 184:19 185:13 187:21 188: 10 190:2 196:7 197:23 198:23 205:4 207:25 212:6,10 213:7,8 217:17 Suppliers' [15] 48:16 51:1 72:11, 24 94:14,25 95:2,10 100:17 116: 11 122:5,8 144:11 187:25 198:25 supply [1] 113:24 support [17] 53:20,22 55:14 61:14 68:17 75:22,24 100:7 101:1 104:2 109:20 137:9 140:2 151:4,18,22 160:18 supported [3] 61:12 155:21 161: 25	supporting [4] 30:13 136:3,13 143:7 supports [4] 129:24 142:12 151: 20 188:9 suppose [1] 24:7 supposed [1] 26:18 supposedly [2] 64:3 65:8 surely [1] 179:5 surface [1] 111:1 surprise [1] 182:1 surprised [1] 183:12 surprising [1] 74:10 survey [142] 38:5,9,16 39:1,5,19, 21 41:25 42:4 44:18 46:1 47:24 48:23 52:21 56:16 58:17 60:25 61: 1,7,8,12,19 62:15 63:10 85:3,5,7 90:14 92:8 94:11,15 103:18,19 116:15,17 117:15,17 123:7,9,16, 19 124:1,20,23 125:3,8,11,15,17, 17,21,22,25 126:1,1,5,7 127:15,25 128:1,18,19 129:2 130:4 136:22 142:2,11,17 148:4,5,6,11,18 149: 12 155:22 159:1,2,14 160:20 161: 1,22 162:6,19 163:25 164:1,6,6,25 166:13 167:10,21 168:15,16 196: 8,10,11,13,22,23 197:1,2,4 198:13, 13,14,17,19 199:4,9 203:24 204: 13,19 206:7,23 207:6,16,16,17 208:7,7 209:1,6,7,8 210:5,12,13, 15,17,18,19 211:2,2,7 215:2,9,17, 18,20,22,23 216:18 surveyed [1] 166:19 surveying [1] 37:14 surveys [67] 34:4,9 35:14,20,23,24 36:4,5,14 37:18 38:1,11,14,17 39: 3,10 40:5,10 42:9,12 45:4 47:16 51:7 52:25 55:2 58:13,15 59:6 60: 22,23 61:3,10,21,23 62:3,4,8,19 63:21 64:1 65:20 75:21,25 105:8 116:13 123:2 127:15 134:24 135: 11 142:5,6,15 148:1 149:17 150:2 151:17 164:3,10 198:11 206:25 208:14,24 209:12 214:21,22 215: 19,21 suspect [1] 7:24 SUZANNE [2] 1:10 7:10 swallowed [1] 93:21 switch [2] 6:9 32:18 46:5 50:13 60: 21 218:3 switched [2] 114:21 209:24 Syndex [5] 30:24 31:7 128:10 151: 8 217:19 syndicated [2] 46:19 64:8 79:6 184:21 195:2 199:1 syndicator [1] 194:23 system [50] 6:7 8:8,20 19:23 20:1 21:20 40:21 41:12 51:14,20 82:4 83:1 93:19 118:21 135:11 136:11 137:12 138:4,11 139:13,19 140: 11,24 141:11 142:1,8,14,15 144:9 151:17 153:22 160:20 171:14,15, 16,23 172:1 173:22 174:1 177:9	185:25 194:12,18 195:14 201:9 210:17,23 211:1 213:23 216:7 systems [52] 39:23 40:7,7,12 41:2, 7 47:8 51:18,19 55:4,4 56:7,9 64: 3,4,13 65:8 94:4 96:16 97:13 117: 18 123:9,16,23 124:6,8,9,13,14 125:11,12 126:2 132:18 133:24 137:22 142:2,19 146:10 151:10 167:3,12,13 170:14 172:11 195:8 197:8 198:3,4 206:20 211:1 214:8 216:23 <hr/> T table [4] 15:3 16:4 132:12 145:3 tables [1] 77:10 talked [5] 89:20 91:1 140:22 196: 16 207:9 talks [1] 88:2 tallying [1] 154:21 target [1] 182:7 task [7] 52:14,15 84:12 165:12 175: 16 184:12 185:24 tasked [1] 213:19 TBS [4] 69:4,8,17 70:12 teachers [2] 113:1,7 teaching [1] 156:16 team [7] 46:16 62:15 81:22 182:19 198:18,21 207:25 teams [4] 79:7 80:18 205:20,21 tease [1] 176:17 tech [2] 20:7 135:13 technical [2] 56:12 101:10 technological [1] 10:14 technologies [1] 216:23 technology [4] 6:10 16:4 110:16 114:20 telecasts [1] 168:10 Telecommunications [1] 138:16 Telephone [1] 39:24 televised [1] 64:20 Television [154] 2:18 3:13 10:20, 21 15:24 16:17,23,24 31:24 34:5, 15 37:10 43:3,6,7 44:10 45:14 48: 15 49:4 51:10 52:9 55:5 57:3,17 75:1 76:22,25 77:17,18,20 78:3,7, 23 79:1,19,25 80:14,22 81:8 82:2, 3,10 96:15,22 97:5 104:23 105:1, 21 106:1,8,12,25 107:6,19,23,25 108:1,2,5,8,15,17,24,25 109:5,17 110:2,3,5,8,10,13 111:9,17,19,20 112:4,9,23 113:6,21,25 114:1,3,6, 12,12,21,24 115:4,5,20 116:4,9,14, 20,23 117:1,3,19 118:3 119:1,4,10 120:5,13 121:11 122:6,9 123:4,8, 10,14,17,21 124:15,17 125:9,19, 21 126:3,8,15,17,20 127:18 128:2, 6,11,25 129:10,11,15,20,25 130:9, 12 132:14 138:15 157:21 168:24, 25 172:10,10 176:16 185:6,17,22 188:17 197:9,13 207:14 216:14 218:15 Television's [26] 105:17,21,25 106:4 107:8 111:24 114:17 115:
--	--	--	---

<p>25 116:6 117:6,23 118:16 121:24 124:22,24 125:4 126:12,21 127:2, 5,11,22 128:14,21 129:3,7 tells [1] 137:17 ten [9] 67:23 68:2,3 87:19 88:16 111:14 118:22 201:1 202:14 tennis [2] 66:7 67:7 Tenth [3] 3:19 164:7,9 tenure [1] 212:2 terminology [1] 9:24 terms [12] 69:10 93:16 102:12,14 126:25 156:20 159:6 170:3 177:7 181:24 184:18 186:18 Terrific [2] 29:23 223:25 test [3] 167:24 172:6 173:1 tested [1] 162:7 testified [10] 38:23,25 39:11 55:25 117:14 118:4 149:9 156:25 157:2 211:23 testifies [1] 195:21 testify [30] 11:22 27:2 28:22 32:23 33:15 39:3 47:17 52:19 53:2 65:1 73:13,14 75:9 98:13 102:4 117:7 118:9,15 122:19 125:1 128:1 147: 11 149:16 167:2,21 208:25 209:5, 10 212:8 215:6 testifying [1] 195:22 testimonies [4] 205:9 206:11 209: 16 213:12 testimony [85] 8:13 11:23,25 14: 14 21:5,10 22:3,20 23:22 24:9,16 26:3,19,22 28:1,2 30:14 32:24 33: 9,13 39:14,17 50:6 51:5 68:23 69: 3 73:5,11 100:5,6,18,22 101:4 107:5,15,17,18 110:12 112:3 113:8 117:21 118:8 128:7 134:2, 13 135:10 140:16,25 141:7,21 156:19 172:5,6,8,15 175:1,2 181: 12,13,18,25 182:1,2,4,8 192:21,24 204:5,24 205:3,7 206:3,10,15,24 208:4 209:15 210:7,8 211:10 213: 10 220:24 221:22,23 testing [2] 18:25 210:14 tests [1] 211:7 thanks [2] 12:3 214:5 Thanksgiving [3] 27:8 71:17 182: 21 theirs [1] 50:19 themselves [9] 34:17,24 40:5,16 62:10 97:14 98:7 152:19 215:6 theoretical [2] 187:17 193:18 theory [2] 170:12,20 there's [24] 14:5 18:24 27:21 49: 17 59:12,13,13 60:18 63:9,13 133: 8 144:16 145:15,16 147:9 166:11, 22,22 167:18 172:5,24 177:3,8 179:1 therefore [3] 19:3 55:6 91:20 They'll [1] 171:9 they've [3] 59:8 61:6,15 thinking [4] 154:4 200:1 203:9,12 thinks [1] 196:3</p>	<p>third [12] 22:17,19 32:22 57:18 85: 21 101:12 160:11 161:5 181:4 196:5 200:23 205:24 third-party [1] 160:4 though [7] 20:22 68:13 71:8 85:19 123:16 154:12 178:15 thoughts [1] 182:10 thousand [3] 67:11,12 83:17 thousands [1] 159:20 three [33] 33:7 62:11,11 63:5 64:9 76:13 84:9,24 85:2 86:1 90:19 94: 11,12 103:15 107:6 111:15 114: 25 130:5,6 134:5 147:7 155:5 156: 5 158:13 160:17 174:19 180:22, 23 188:6 189:10 199:22 200:16 208:13 three-part [1] 40:17 three-percentage [1] 47:23 three-point [1] 48:8 three-tenths [1] 158:9 throughout [10] 13:10 42:2 73:3 90:3 140:19 155:11,18 159:5 186: 11 217:7 throw [2] 173:14,20 throwing [1] 177:14 Thursday [1] 224:20 Tiaras [1] 112:14 tie [1] 68:11 tied [2] 39:23 50:20 ties [1] 193:15 timeline [1] 23:1 timing [1] 130:17 titles [1] 166:14 Today [17] 6:11 7:19 12:17 15:14 16:2 17:8,12 42:8 140:9 145:4 148:8 150:5 157:7 172:2 183:23 184:12 218:4 Toddlers [1] 112:14 together [10] 18:17 63:22 93:7 107:4 126:25 133:7 175:13 182: 19 199:2 221:18 tomorrow [4] 19:6 218:6 223:11 224:8 took [4] 71:24 92:18 121:9 197:9 top [6] 51:19 90:18 94:11 122:16 143:10 176:15 topic [1] 106:11 Toronto [1] 135:16 total [9] 32:1,15 40:13 69:10 103:1, 21 119:2 134:4 145:8 totally [4] 36:8 47:7 123:15 216:9 tournament [1] 67:7 track [1] 43:21 traditionally [2] 198:21 208:1 training [3] 30:1 113:7 203:17 transaction [2] 189:4 194:1 transactions [1] 186:14 transcript [1] 226:4 transformed [1] 9:11 translates [1] 188:20 translating [1] 88:22 transmitted [2] 14:11 44:24</p>	<p>traps [1] 176:5 Trautman [2] 32:25 33:3 38:6,7 39:20 40:14 42:10,15 47:10,17 62: 18 63:3 65:1,18,19 123:25 124:5 167:2 206:11 209:17 223:11 Trautman's [4] 123:22 124:10 204:5 208:4 travel [1] 115:17 treat [1] 179:7 treated [1] 158:4 treatment [1] 87:5 tremendous [2] 115:25 150:6 tremendously [1] 110:21 trend [5] 49:7 144:16,19,23 211:17 trial [2] 76:18 179:21 Tribunal [3] 87:20,21 88:1 tribunals [1] 149:4 Tribune [5] 165:25 168:21,22 172: 8,14 tried [4] 16:6 60:3 182:19,20 tries [1] 171:16 triggering [1] 24:7 trip [1] 184:3 triple [1] 21:19 troublesome [2] 63:6 197:25 troubling [1] 91:3 Truckers [1] 112:13 true [2] 6:9 226:3 trust [1] 114:7 trusted [2] 114:11,14 trustworthy [2] 114:5 161:10 try [3] 36:2 46:1 84:12,21 88:9 98: 12 167:11 224:10 trying [13] 18:14 22:10 24:2 26:5,6 66:13 78:25 119:24 120:24 121: 19 122:14 174:11 217:4 Tuesday [3] 19:9,11 224:4 turn [7] 67:18 96:7 100:14 109:24 121:22 159:23 161:20 turned [3] 19:4 114:1 158:21 turning [2] 91:7 123:1 turns [2] 26:2 156:15 TVA [1] 141:16 tweak [1] 165:15 tweaks [2] 153:25 159:11 twice [1] 127:19 two [45] 7:17 21:3,4 25:3 34:3,8 38: 4 51:7 55:18 57:2,21,25 58:5,24 59:3 64:15,16,17 67:10 72:17 83: 12 92:23 114:25 118:22 128:16 130:5 147:1,4,7 148:1 149:17 153: 6 156:7 159:17 165:17 174:18 180:23 198:6,6 200:22 201:2 208: 10 214:4 218:10,10 twofold [2] 41:8 62:21 type [12] 41:10,13,14 57:24 62:9, 14 80:20 133:16 136:10 138:23 139:11 189:8 types [4] 41:20,20 52:20 62:11 83: 9 108:12 133:4 149:21 typically [2] 80:24 190:16</p>	<p>U.S. [13] 44:11 77:19 78:6 79:25 108:4 132:17 133:1,8,9 136:25 139:3 140:8 164:24 ultimate [2] 84:8,23 ultimately [4] 6:13 20:7 104:2 221: 21 unable [1] 167:24 unaware [1] 23:21 uncertainty [1] 159:22 unchanged [1] 41:25 unconcerned [1] 216:9 under [13] 11:12 22:23 40:21 46: 24 68:14 69:12 133:20 144:3 156: 18 171:13,15 173:21 198:19 under-value [1] 198:25 underestimation [1] 155:1 underlying [6] 23:7,22 24:18 25: 23 26:2 90:6 underscores [1] 157:11 understand [14] 24:22 25:6 66:25 120:3,15 123:8 133:17 175:18 179:4 192:10 200:3 202:23 217:9 221:17 understanding [4] 14:1 22:16 28: 23 86:8 understate [1] 149:6 understates [1] 125:3 understood [1] 49:1 undertook [1] 92:21 undifferentiated [1] 35:1 undisputed [1] 113:2 undoubtedly [1] 12:18 unfair [2] 183:7,10 uniform [1] 133:16 unique [10] 53:3 81:9,19 106:13 108:21,22,22 109:18 142:9 173:5 UNITED [8] 1:1 133:19,22 139:9 140:14,19 141:24 205:25 universe [3] 40:12 125:10 172:3 University [11] 38:18,19,19 55:23 134:22,23 135:2,16 156:16 206: 21 208:22 unless [1] 222:18 unlike [9] 81:10 94:22 96:3 108:7 133:13,14 192:22 193:15 unlikely [2] 215:7,9 unnatural [1] 149:19 unnecessarily [1] 10:24 unnecessary [2] 15:8 26:7 unredacted [1] 207:3 unregulated [1] 206:6 unrelated [1] 88:8 unreliable [3] 176:20 203:21 208: 14 unrivaled [1] 114:7 unseen [3] 155:25 159:4 175:23 unsettling [1] 172:23 unsuccessful [1] 90:8 until [12] 13:20 27:8 33:1 51:22 71: 17 96:14 202:23 206:18 211:15 220:16 222:23 224:18 unusual [1] 202:22</p>
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U

<p>unwary [1] 176:5</p> <p>up [55] 10:8 20:23 21:6 30:19 32:1 34:13 35:3 46:23 47:18,24 48:15 49:4,8,9,16 50:23 54:15 62:10 63:17 76:14,20 82:23 90:15 101:19 106:16 112:11 119:23 120:10 131:1 143:14 144:14,24 146:4,16 147:6,21 154:21 159:3 164:12 166:7,16,20,25 169:19 174:3 195:3,6 204:8 211:15 216:24 218:3 221:24 222:2,5 223:11</p> <p>upcoming [1] 80:18</p> <p>updated [1] 99:18</p> <p>upload [1] 218:13</p> <p>uploaded [2] 218:12 219:2</p> <p>upward [2] 49:7 144:19</p> <p>urge [2] 26:1 214:23</p> <p>urgency [1] 23:1</p> <p>urges [1] 175:2</p> <p>useful [5] 57:20 90:12 91:5 190:16,21 209:13</p> <p>uses [3] 95:17 137:11 138:14</p> <p>using [16] 8:19 72:16,17 73:15 74:14 83:11 105:18 114:23 120:11 128:19 136:2 138:25 139:1 150:12 175:18 218:17</p> <p>utilize [1] 207:20</p> <p style="text-align: center;">V</p> <p>Valentine's [3] 29:24 77:3 157:8</p> <p>valid [5] 62:20 70:16 73:9 148:3 199:6 204:19 210:20 211:8</p> <p>validly [1] 102:17</p> <p>valuable [11] 7:16 62:9,16 93:12 111:18 114:2,4 117:3 123:11 162:7 165:4</p> <p>valuation [15] 56:18,21 64:24 118:1 128:5 159:19 162:5 168:4,21 173:5 187:4 201:3,11,20 202:13</p> <p>valuations [4] 59:14 116:19 119:8 147:14</p> <p>value [111] 36:17 37:9,13 45:6 46:10,13 54:1 57:11 63:11 64:2,5 66:13 68:10,18,22 70:5 84:14,19 86:3 88:4,22 91:11 92:16 95:9 97:4 98:8 101:7 105:4,7,13,22 106:5 110:6,7 111:25 114:17 116:1,14,22 120:14 121:10,13,16 122:24 123:3,17 124:11,16 125:4,18 126:21 127:3,12,23 129:20 135:23 136:6 137:18 138:10 139:6 142:23,25 144:24 145:13 148:2 149:6,17,23 150:25 151:12 154:22 157:4 159:10,21 161:9 162:3 166:16,17 169:11,12,14 173:25 174:2,4,5,11,12,13,23,23 176:11,16 186:17,23 187:11 188:18,20 189:16 191:6 192:21 193:19 197:16 206:5,9 208:13 209:3 213:7,8,17 215:3 216:20</p> <p>valued [4] 56:17 117:2 125:21 127:17</p> <p>values [5] 37:1 52:23 54:5 168:18,</p>	<p>19</p> <p>valuing [2] 51:10 52:19</p> <p>variable [1] 176:1</p> <p>variables [5] 175:5,8,9,25 189:1,5</p> <p>variation [1] 148:4</p> <p>variations [3] 34:14 35:9 93:18</p> <p>varied [1] 90:19</p> <p>variety [3] 37:9 80:15 81:1</p> <p>various [13] 31:2 35:10 38:12 119:8 156:25 175:24 176:21 187:2,14 190:11,11 195:18 210:6</p> <p>vast [2] 109:5 167:17</p> <p>venture [1] 70:17</p> <p>verify [1] 8:6</p> <p>version [4] 148:7 199:8 221:18,23</p> <p>versions [2] 86:17 221:11</p> <p>versus [5] 16:11 102:13 198:9 207:25 219:10</p> <p>veteran [1] 211:23</p> <p>vice [4] 51:15,23 107:9 208:20</p> <p>Vicky [1] 15:17</p> <p>VICTOR [3] 4:9 17:9 132:9</p> <p>video [3] 53:5 111:2,4</p> <p>videos [5] 218:10,13,17 220:1,7</p> <p>view [11] 24:25 35:19 44:1,7 157:16 161:17 162:6 178:1 184:13 197:1 217:10</p> <p>viewed [3] 95:15,19 96:19</p> <p>viewer [2] 112:18 190:7</p> <p>viewers [4] 79:13 88:24 113:23 115:1</p> <p>viewership [5] 87:15 91:9,24 189:14,19</p> <p>viewing [95] 13:14 24:11,19 34:10 36:6,7 43:7 68:8,12,17,22 69:11,13 70:5,14,16 71:7,12 72:5 73:18,20,24 74:4,7,12 75:25 79:16 85:22 86:21 87:10,17,22 88:3,9,20 90:2,5 91:21 92:5 95:12,20,24 96:3,4,5 98:12 101:24 102:6,8,18 103:18 105:8 110:4 116:9 121:23,24 122:3,7,10,17,20 127:7 129:14 145:17 147:9,13 150:23 158:19,20,23 174:10,13 188:8,11,13,19,21,24 189:7,9,12 190:10,13,15,24,25 191:13 192:21 193:17,25 212:6,9,21 213:2 214:16</p> <p>views [4] 39:16 164:15 168:3 181:19</p> <p>vintage [1] 59:19</p> <p>violates [1] 23:19</p> <p>virtually [4] 71:6 84:11 112:20 164:13</p> <p>visually [1] 97:2</p> <p>void [1] 113:21</p> <p>VOLUME [7] 1:21 50:8 67:1,2 88:9 138:2 202:5</p> <p>VP [1] 211:14</p> <p style="text-align: center;">W</p> <p>WA-1 [1] 201:14</p> <p>wait [2] 13:20 179:24</p> <p>waived [1] 205:5</p>	<p>Waldfoegel [5] 57:7,23 90:13 92:20 94:8 98:22 126:18 136:9</p> <p>Waldfoegel's [1] 161:14</p> <p>Waldfoegel-type [4] 138:13 145:14,16 147:8</p> <p>wanted [5] 22:1 87:1 101:10 103:13 180:14,17 203:16 221:12</p> <p>wanting [1] 8:22</p> <p>WARLEY [3] 5:4 18:1 157:6</p> <p>warm-up [3] 40:22 41:8 199:9</p> <p>warned [4] 27:21 28:10,11,11</p> <p>Washington [12] 1:17 2:10,16,24 3:10,20 4:6,20 5:8 108:20 133:23 172:12</p> <p>watch [4] 78:24 111:3 174:15 216:16</p> <p>watched [1] 88:24</p> <p>watches [1] 216:10</p> <p>watching [1] 71:14</p> <p>way [33] 8:4 12:15 16:9 31:19 33:22 36:19 37:20 43:2 53:12 61:16 63:13 64:23 69:12 82:19 85:17 90:15 104:12 105:6,13 120:4,22 123:24 143:24 145:1 146:13,16 158:3 175:19 178:2 195:5,12 200:22 222:13</p> <p>ways [5] 36:1 81:23 84:5 96:25 98:12 173:12</p> <p>wayside [1] 33:11</p> <p>WDWC [1] 172:12</p> <p>weak [1] 147:12</p> <p>weather [1] 81:2</p> <p>Web [1] 118:5</p> <p>website [3] 218:25 219:16,16</p> <p>Wecker [4] 70:20 71:11 72:19 74:6</p> <p>Wednesday [2] 157:7,8</p> <p>week [5] 30:2 33:1 165:3,4 182:24</p> <p>weekend [1] 18:24 19:2 224:9</p> <p>weeks [2] 25:3 153:14</p> <p>weight [10] 87:17 121:1 144:7 187:15 204:18 215:8,10,15,16,18</p> <p>weighted [3] 40:11 144:12 207:5</p> <p>weighting [2] 143:18,23</p> <p>weights [2] 72:12,17</p> <p>Welcome [4] 6:11 18:9 61:2 82:17</p> <p>WETA [1] 108:19</p> <p>WGBH [3] 108:18 115:9,14</p> <p>WGN [38] 42:24 46:20 47:1,9 83:19 143:1 160:22,24 162:24 165:19 166:1,18,24 167:4,13 168:1,5,7,9,22 170:4,9,9,17,19,23 171:11,17,17,20,21,25 172:18,19,22 173:1,8 182:12</p> <p>WGN's [1] 63:12</p> <p>WGN-only [3] 166:20 167:13 198:3</p> <p>WGNA [27] 24:11,19 42:18 43:12,15,22,25 44:2,14,20,21 45:6,16,21 46:9 50:16 54:25 63:7 71:8 72:5,13,15,22 73:20 197:17,19 198:5</p> <p>whatever [7] 9:12 27:4 49:24 95:9</p>	<p>121:1 143:1 166:21</p> <p>Whenever [1] 13:15</p> <p>whereas [2] 48:16 142:25</p> <p>whereby [1] 195:12</p> <p>Whereupon [2] 131:2 224:19</p> <p>whether [22] 13:22 38:2 39:1 77:22 85:15 88:25 120:17 150:16 158:21 174:14 180:25 181:6 187:16 189:21 190:14 199:19 200:3 201:1,19 211:3 216:9 222:4</p> <p>whine [1] 7:19</p> <p>White [1] 46:18</p> <p>Whittle [5] 7:13 177:20 178:16,24 180:8</p> <p>Whittle's [1] 7:21</p> <p>whole [5] 146:8 168:25 176:2 211:24 224:13</p> <p>wholly [1] 77:2</p> <p>whom [5] 7:3 15:5 37:7 207:9 212:13</p> <p>wide [1] 81:1</p> <p>widely [7] 42:17 53:9,10 69:6 143:22 144:1 168:23</p> <p>will [263] 8:1,1,5,15 9:2,4 10:2,10,24 11:4,6,14,19,22 12:9,13 13:17,22,24 14:1 15:20,22 16:13 17:1,3 18:18,23 19:1 20:1,4,6 21:18,21,22 25:14,22 28:4,22 29:16 30:8,13,14 31:8 32:2 33:3,16 34:2 36:12 38:4,12 39:3,13,20 40:14,25 42:10,14,15 43:22,23 47:10,17 49:3 50:5 52:1,19,20 53:2,14,19,21 58:10 59:21,22,22 62:19 63:3,25 64:12 65:1,19 66:14 67:15,16 68:3,16 69:25 70:8 73:10,13,14 74:6,16 75:2,9,14,22 76:10,10,14 78:16,19,24 80:7,13 83:18,19 84:6 85:9 88:7 90:22 95:13 96:1,8 97:3,9,15,21 98:13,14 100:10 101:17,18 102:11,21,24 103:22 104:2,4,11 105:23 107:5 110:24 112:2 116:5 117:4,7 118:15 121:17 122:18 125:1,6,7 128:1 130:18,18,25 134:1,5,10,13,18,23 135:2,9,10,14,20,22 138:8 140:7,17 141:14,21 147:11 149:15 151:15 152:24 156:7,11,13 159:16,17 160:1,2,9,12,17,18,22 161:5,8 162:11 163:18 164:4,14 165:12 167:21 169:19 170:2 172:5 173:1,2,23 174:9 176:24 177:23 178:12,15 179:7,19 180:20 182:3 183:6,14 184:24 187:3,25 191:3,18 192:3,20,23,24 193:17,25 195:18,20,22,25 196:2 197:18 198:10 200:15 203:25 204:4,4,12,21,23,25 205:6 206:3,14,16 207:8 208:16,25 209:5,10,16,20 210:8 211:11 212:5,7,12 214:13 215:5 216:1 217:12 220:15 221:2 222:5,11 223:11,19,21,22 224:5,7,17</p> <p>Willamette [1] 135:9</p>
--	--	---	--

William [2] 70:20 156:14	year [34] 7:17 27:8 30:24 31:9 32:
willing [3] 169:22 171:6,9	15 38:1,1,3 40:4,9 42:20 43:15 46:
wine [1] 59:19	1,20 51:20 59:9,9,9,17 64:16 70:
Winthrop [2] 5:6 17:19	19 71:10 72:15 80:2 92:21 103:20
Wisconsin [1] 38:19	146:20 184:7 188:2,3,12,13 202:
wisdom [1] 204:9	20 210:18
wise [2] 159:25 160:1	years [53] 6:15 7:17 32:12,17 38:
wish [1] 12:15	11 39:10 41:3 42:1,18,24 44:5,14,
within [17] 64:11 72:25 78:11 79:	18,25 45:5 47:25 49:12 51:12,17,
16,23 80:21 82:11 83:23 84:2 93:	21 58:14,22 59:4 61:24 69:7 86:
19 99:21 194:10 198:21,23 200:	10,12 87:19 88:16 94:4 99:11 101:
17 201:1 208:1	25 102:23 103:19 111:15 117:10
without [12] 7:5 45:6 61:17 62:23	128:22 129:17 130:14 142:6 147:
66:22 107:16 162:13 179:17 191:	7 150:8 152:12 154:11 155:19
9,16 214:19,19	158:8,12 171:11 196:14 210:24
witness [37] 11:17,21,21 12:2 13:	212:11 213:4 217:20
16 21:1,6,7,12 22:5 27:1,3 28:24	yield [1] 204:19
29:2 96:8 97:15,20 99:4 100:3	yielded [1] 182:22
101:21 107:8 116:5 122:5,8 126:	yields [2] 199:6 203:21
17 128:1 149:15 156:13 160:9	York [8] 108:19 135:2 172:12,17
205:10,14 206:16 211:11 212:12	206:21 208:22
213:13,14 223:15	yourself [1] 14:19
witness' [1] 120:10	<hr/>
witnesses [41] 8:20,21 11:19 21:9,	Z
13 28:21 30:12 32:19 33:2,7,14	<hr/>
38:4 39:11 42:16 51:8 59:21 70:2	zero [5] 128:15 148:12 150:15,25
73:13,13 78:17 80:14 84:7 95:13	158:5
100:14 107:6 118:7,11 133:25	
134:3,4,20 135:22 156:5 159:15,	
16 182:6 204:22 213:12 214:13	
215:6 217:8	
WNET [1] 108:18	
won [3] 111:10,12,14	
wonder [1] 182:7	
Wong [2] 134:15 140:16	
word [1] 123:22	
words [6] 109:4 164:10 165:1 166:	
21 180:17 192:10	
work [8] 8:6 97:19 99:9 151:2 169:	
24 196:3 205:22 221:17	
worked [6] 48:2,3 51:12 101:24	
159:19 205:23	
working [2] 9:5 99:6	
works [4] 48:9 193:10 196:4 213:3	
Workshop [1] 109:1	
World [8] 115:11,12 119:6 140:20	
153:16 154:2 158:1 191:15	
worse [1] 65:4	
worthless [1] 149:1	
woven [1] 180:23	
WPIX [2] 172:13,16	
wrestling [2] 64:17,18	
wrinkle [1] 32:21	
writ [1] 156:22	
writing [2] 140:17 183:4	
written [22] 8:13 11:23,23,24 12:	
12 21:5 26:19,22 28:1,1 30:20	
107:15,18 134:13 162:11,13 181:	
16 206:11,15 209:16 210:8 213:	
12	
wrote [1] 209:22	
<hr/>	
Y	
<hr/>	